

J.H.H. WEILER

Supranational law and the supranational system:
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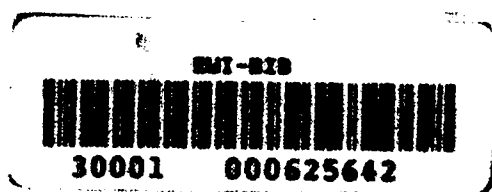
Legal structure and political process in the
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European Community
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by

Joseph H.H. Weiler

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Acknowledgements

In the course of preparing what is a general study of the Community system I have become indebted to numerous people, both academics and Community officials, who have helped me in many small and big ways.

Although submission of this thesis is an interim stage towards final completion and eventual publication, I would like already on this occasion to express my thanks to those whose assistance facilitated arriving at this point.

In the course of my research I circulated a paper of work in progress which was read by several colleagues and friends. This paper constituted the core of the thesis -- its real heart. All of these friends and colleagues offered comments and criticism but above all a large measure of support and encouragement which was invaluable considering the problems, and often despair, in trying to write a general study of a phenomenon -- the Community system -- already well researched and studied by so many others before me.

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This study was written during my period of work at the European University Institute. Although in many ways my duties at the Institute were not always compatible with sustained research and writing, I cannot think of a better place to have engaged in this task. The multinational composition of our researchers and academic staff produced an interested, critical and stimulating environment against which I could try out new ideas as they emerged in the course of the last two years.

In addition I was privileged by two other factors;

Firstly, my colleagues in the Department of Law were not only kind, friendly and encouraging - but also, when necessary, hard, critical and impatient for me to finish this stage in my work. Of even greater importance, their approach to law and research in law-- always to be seen in its social, economic and/or political context -- was consonant with my own. I was able to attend, not as regularly as I would have wished, their seminars the influence of which is noticeable in many places in my study. Thus warm thanks to Terry Daintith, Klaus Hopt, Yves Mény, Gunther Teubner, Monica Seccombe and above all Mauro Cappelletti.

Secondly, I have profited immensely from my association with the European Integration Project

directed by Mauro Cappelletti. Helping in the direction and co-editing has drained my physical forces but has enriched incalculably my intellectual understanding of non-unitary systems. I hope this study, even at this stage, may be considered as a modest contribution to that wide ranging and profound project.

It is customary to end these thanks with a mention of secreterial help. Whatever I say will not be sufficient to acknowledge my thanks to Evie Valerio and Marie-Ange Catotti whose professionalism, patience (plenty of it was needed) and good humour were always available in abundance.

Note about sources

I have frequently used Reports prepared for the Project on European Integration conducted in the Law Department of the E.U.I. and directed by M. Cappelletti. Since these have not yet been published I have cited them simply as Florence Project.

For the statistical data used in chapters 9 and 11 I have conducted a manual search through the official sources of the Community. Very kindly the legal service of the Commission and the Secretariat of the Commission have agreed to verify and complete these data with the help of their computerised data banks. Some of the tables have not been included pending the verification from the Communities.

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INTRODUCTION

Presenting a new legal study on the European Community system^{1/} may require some explanation or even justification. After all since its creation in 1951^{2/} an abundance of comprehensive legal analyses of the Community (the main framework for European integration^{3/}) has emerged, second only in volume among treatments of international organizations and associations of states to the extensive literature on the United Nations system. Several factors, I believe, may be found which render a new retrospective analysis worthwhile.

In a sharp critique of a recent study of the European Community juridical order, an eminent political scientist has made the following comments -- comments which could be leveled against much of the recent legal literature on the Community:

It is a careful and systematic exposition of the judicial review provisions of the "constitution" of the European Economic Community, an exposition that is helpful for a newcomer to these materials. But ...
[i]t is constitutional law without politics....
[i]t presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of

the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology
[§]uch an approach has proved fundamentally arid in the study of [national] constitutions ... it must reduce constitutional scholarship to something like that early stage of archeology that resembled the collection of antiquities ... oblivious to their context or living matrix.^{4//}

The primary goal of my own study will be precisely to meet this critique of, and challenge to, European legal literature. For I shall try to analyse the Community constitutional order with particular regard to "its living matrix", and the interaction between law and politics, constitutions and institutions, principles and practice, the Court of Justice and the political organs will lie at the core of this work. I shall try to go even further: By engaging in this type of analysis of the Community system I will seek to clarify some of the fundamental concepts used to characterize the Community within the framework of the theory of international organizations. Indeed I hope to demonstrate that the analysis of law within its political context may offer us fresh insights into these theoretical concepts.

What are the roots of the disciplinary entrenchment of European constitutional law from which this volume

tries to break out? In some senses the problem is of relatively recent origins. In its formative years -- the 50's and early 60's -- the Community and the study of the Community presented an interesting episode in the history of ideas. In the first place there was a high measure of congruence between social science theories (and even predictions!) and actual socio-political events. The process of European integration seemed to confirm the predictions of the theorists; moreover the political vision and practice of many of the political actors themselves seemed to be inspired by the precepts of the major integration theories. Politicians were in this sense theorists in action.

Second, a broad consensus^{5/} existed within the social sciences that an understanding of the process of integration in general, and the emerging Communities in particular, would require excursions beyond any single fixed classical discipline. This consensus was not merely a reiteration of the standard lip service that many of us so often pay to "interdisciplinary" analysis. Here instead was a phenomenon wherein the actors themselves deliberately sought to use economic means within a new international legal framework to achieve social and political objectives. And in this scheme the eco-

economic and legal means became as important as the political ends. Lawyers and the law, often the "ugly ducklings" of the social sciences, were perceived as having a central role in the new venture. Not only was the general framework for integration set out in international treaties, but an essential feature of the Community was the creation of quasi-autonomous law-creating organs and a sophisticated legal system with all the paraphernalia of a court and rules for judicial review.

This convergence of theory and practice and the emergence of "European Integration" as a field straddling the well established social science disciplines produced a series of challenging studies dealing with the Community in its first phases.^{6/} So long as prescription coincided (more or less) with description and so long as events seemed to follow the predictions which the theories had charted, the coalescence of political, legal and economic analysis in the interpretation of the Community system was maintained.

The mid-60's crises in the process of European integration (linked to and symbolised by the advent of De Gaulle) and the subsequent economic crisis precipitated in 1973, introduced a rupture into the

marriage of theory and practice and into the disciplinary coalescence. This rupture^{7/} manifested itself in several different ways.

As regards the overall theories of integration, despite the immense and intellectually exciting effort to adapt these to changing events^{7/} reality no longer seemed to follow predictions and therefore the interest in, and the relevance of, the "general theory" could not be revived. Indeed, the very reporting of the facts of the mid-60's crises revealed a diverging perception of the process of integration and a cleavage, especially between political and legal treatment, became apparent. (I shall return to this cleavage in greater detail in subsequent chapters.) Thus the disintegration of general integration theories in the late 60's and early 70's was accompanied (with some notable exceptions) by a strong tendency towards disciplinary entrenchment. Furthermore, in sheer volume, Community activity had become overwhelmingly intense and extremely intricate so as to defy a single analytical framework. As a result of these developments, interpretations tended to fall into one of two types: a) general treatments of either law, or politics or economics; or, b) where a more integrated approach^{7/}

was adopted, sectoral treatises dealing with fisheries, or agriculture, or competition, and the like. Frequently studies were to become both unidisciplinary and sectoral.^{8/} Thus, whereas the need for the specialised legal text, whether general or sectoral, has been amply satisfied, the above mentioned danger of aridity has increased. Several recent scholarly treatments, to which this study adds a specific dimension, have perceived and begun to fill this lacuna.^{9/}

In addition to methodology ^{other} / it is possible to articulate several factors which make this task particularly urgent and potentially rewarding.

In the first place, the Community is obviously not a static phenomenon; indeed in its thirty years of existence it has displayed a remarkable dynamism which has affected dramatically important aspects of its constitutional and political architecture. This thirty-year period might well provide a suitable perspective from which to analyse these developments and identify certain longer term trends in the Community's evolution. Indeed, some recent developments may be of such consequence as to render the early 80's a turning point in this evolution, presenting new challenges for the future and calling for a fresh understanding of the system at present. In particular three develop-

ments deserve special mention.

a. The accession of Greece^{10/} has opened the second phase of Community enlargement. Once completed the number of Member States originally parties to the Treaties of Paris and Rome will have doubled. The quantitative change is likely to put serious strains on the Community's decision making apparatus as well as raising a host of technical problems; the social and economic character of the new Members is likely to put no less a strain on the substantive policies of the Community and the precarious balance of Member State interests which they represent.^{11/}

b. The impact of the European Parliament -- directly elected in the closing months of the last decade -- on the institutional balance is likely to increase. The newly "legitimized" chamber has already flexed its muscles, indicating its growing awareness of the discrepancy between its self-perceived functions and its constitutional impotence. Institutional conflict is likely to become more frequent^{12/} as will proposals for structural changes within the Community.^{13/}

c. The third development is a combination of several factors going beyond the periodic crises to which the Community has become accustomed.^{14/} It goes to

the very viability of the Community as a workable binding system. Symptomatic of this malaise is the fact, for example, that the Common Agricultural Policy, one of the mainstay/Community policies, the elaboration of which in the 60's represented a major Community success and indicated a communion of interests between France and Germany, seems to be on a crisis/course. Not only are the effects of the policy criticized but even under the of the Treaties budgetary rules the Community will not be able to finance it for long. Attempts at reformulation of this basic policy are taking place in an economic climate of stringency, unemployment, energy shortages and balance of payment deficits all of which have sharpened national differences and are already testing the Community cohesion to its limit. These difficulties are partially responsible for an ominous resurgence of national resistance -- both political and legal -- to the Community system. In the former sphere the commitment of the British Labour party to withdraw from the Common Market and the Debré-Foyer Bill in the French Assembly indicate strong grass roots feelings.^{15/}

In the legal arena as well, the Community, standing unique among international organizations and associations of states as regards the credibility of its judicial order, is facing a dangerous incidence of non-compliance.^{16/} Not only have several judgments of the European Court of

Justice been flouted -- with apparent impunity -- but even the basic judicial policy of integration has been called into question.^{17/} Should these so far isolated events become a trend one basis for the operation of all Community policy will have been destroyed.

Thus, in terms of the number of its Member States, its institutional composition and the substantive problems it must face, the Community of today is very different from that of the 50's, 60's and even early 70's.

One can add, beyond these numerical, institutional and substantive changes, yet another set of factors which would vindicate a new departure. In many ways the Community remains a system characterized by a series of interlinking contradictions which seem to defy an explanatory framework. It will be sufficient to identify a sample of these contradictions at several levels of abstraction. At a very pragmatic level there would appear to be a contradiction, or at least a tension, between the never ending cycle of Community crises set against the surprising measure of resilience and "staying power" of the system. All predictions of demise, disintegration or irrelevance^{18/} have so far underestimated an apparent "survival instinct" of the Community. Many of these crises revolve around the relationship of the /

Community to the Member States, and, since that relationship is to be the central theme of our enquiry some explanation of these survival mechanisms will be attempted in the course of this study. Looking at the process of substantive unification in the EEC one may identify a similar tension: In some sectors a high measure of integration has been achieved whereas in others much less or none at all -- and this often with no apparent correlation to the provisions of the Treaties.^{19/}

At a more abstract and theoretical level one finds similar contradictions. For instance an apparently paradoxical tension exists between the formal limitation on Community competences, within a system of enumerated powers having as its aim the demarcation of jurisdiction between the Community and its Member States and the forceful expansion, successful or otherwise, of the Community into a variety of new fields not envisaged in the Treaty.^{20/} At yet another level, the Community as a formal institutional and constitutional hierarchical structure is at constant odds with the Community as a process^{21/} of transnational policy making, a process which transposes all these structural modalities.

Indeed some see the tension not only as between formal structure and political process. Dahrendorf, for example, considers that there is a marked contrast between the latter element and the often suc- →

cessful substantive integration. Thus, he says,

If we survey the history of European co-operation and integration since the war ... the conclusion which suggests itself is ambivalent, not to say contradictory. European union has been a remarkable political success, but an equally remarkable institutional failure. So far as the substance of European co-operation is concerned, we have gone a long way forward; so far as the framework for taking common decisions is concerned, we have locked ourselves into procedures and institutions which at times do more damage than good.^{22/}

To be sure the political institutions and the Community decision making process have received much attention both from academic writers and even the organs themselves ^{23/} as has the evolution of the legal system and the role of the European Court of Justice in that evolution.^{24/} Far less explored has been the relationship between the legal order and the political process, between the Court and the political institutions. Certainly this relationship -- operating in both directions -- is not an easy one. But the tension between the different ethos inspiring the Court and these other -- or at least some of the other -- institutions and the consequences flowing from these dif-

ferences is not only a final contradictory element to be added to our enumeration but may also provide a key to, and explanation of, some of the points raised in this list and a means to solving the tensions which have perplexed Dahrendorf and others.

What is at the source of all these contradictions? Can they be reconciled? Or at least can they be fitted into a coherent explanatory framework? I shall not claim to provide answers to all these queries but I shall at least try to pour some new light deriving from the legal-political analysis. It comes as no surprise that all these elements have become manifest in the theoretical characterizations of the Community experience. The Community has been described, sometimes at the same time, as federal, confederal, supranational and, easiest of all, as sui-generis. Supranationalism (whatever this might mean) has been diagnosed as progressing, stagnating or retrogressing, sometimes all at the same time.^{25/} And indeed, if the Community is neither federal nor confederal (at least, not in the classical sense of these terms), and if one chooses the concept of a supranational system to connote its special identity, a new set of questions arises. What do we mean by this concept? How has the Community developed

as a supranational system? In what sense does it remain one - if at all? And what are the specific problems that the system faces in this period of transition? So it is also to these questions that this study will attempt to suggest some replies.

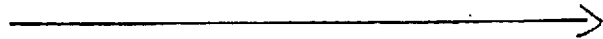
Considering this entire set of problems it becomes obvious that I have a double concern throughout this study. On the one hand I will offer an analysis of the constitutional-institutional system and the relationship of the Community to the Member States. But inextricably linked with this analysis will be an attempt to give meaning to some of the key concepts, theories and doctrines associated with the Community experience -- principally the concept of supranationality.

How then is this enquiry arranged? As the title of this volume indicates I shall be essentially concerned with the alleged special -- supranational -- relationship which exists between the Community as a "general power"^{26/} and its constituent members. I do not follow any particular model of system analysis but have tried to construct my own framework following a rationale which emanates from the Community itself.

Part One of this study deals with the legal and political structure and process which govern the relationship between Community and Member States and

On the basis of the analysis of the legal and political process in Part One I shall then in Part Two, attempt to explain the dynamics in the competences of the Community. In this sense Part One and Part Two not only complement each other, they represent the two basic axes along which the relationship between the General Power and the constituent members unfolds. Part One concerns the vertical axis: the hierarchy (and the changes therein) in our case between Community actors and Member State actors, Community norms and Member State norms. Part Two concerns the horizontal axis: The demarcation (and the changes therein) between Community and Member States' substantive jurisdiction and powers. The combination of the two axes becomes thus my framework for understanding the structure and process of the Community as a non-unitary system.

The dynamics of change as regards competences is once again a phenomenon in which the political and the legal seem at odds with each other. The tension emerges when considering the Community system both

as conceived in the Treaty and as it has developed later. Whereas the Treaty sought to accord a strong dynamic and autonomous role to the political organs and especially the Commission, it did this within a legal framework we are told which/confined Community competences to a restricted domain and one could thus expect jurisdictional expansion to be a priori complex and difficult. The reality of the Community turned out differently however with tremendous legal dynamism but political ossification. The main paradox as regards expanding competences is that at least at first sight the very political motivation behind expansion seems irreconcilable with the powerful trend of Member State circumspection towards the Community. Since the Member States "assembled in the Council"^{27/} have a controlling influence on all Community affairs this expansionist trend calls for some explanations. ! 

—————> Chapter 6 will outline some of the initial premises of the Community: a system of attributed powers and limited competences with a cumbersome mechanism for Treaty amendment. Chapters 7, 8 and 9 trace the disintegration of this closed system and the process of expanding competences. Here as well it is in the Chapter which concludes Part Two, /that I attempt to harmonise legal and political phenomena into a single coherent explanation.

Finally we may turn to Part Three of the study. For if the first two parts combine to present the Community system at a certain level of maturity after 30 years of existence, Part Three completes the picture with two /problems and challenges emanating precisely from that maturity. Thus Chapter 10 deals with the issue of implementation, application and enforcement of Community policy and law, a problem which has become acute only as a result of the massive expansion in Community activity. Thus, whereas Chapter 4 dealt with the constitutional principle of compliance, Chapter 10 highlights its pragmatic problems. Chapter 11 deals with the dual pressures of uniformity and diversity within the Community system. —————>

Thus if Parts One and Two ^{try to} clarify the main features of the system as evolved in the first decades and achieving a certain measure of equilibrium, Part Three focusses on some of the forces, external and internal, which are already threatening the stability and to which the system will have to adapt in the years to come.

Although I have extolled the virtues of the general integrated approach to the treatment of the Community system it is clear that an all-encompassing and interdisciplinary study is probably beyond the scope of any singly authored volume and in any event beyond the scope of the present study. My approach remains essentially a legal analysis although one which attempts to be sensitive to the external political environment. There are however even limits to that sensitivity.

First it will by now be clear that I do not deal, except by way of illustration, with the substantive policies pursued by the Community. This has perhaps absolved me from the need to introduce more than marginal economic and social analysis but it also indicates that this study is neither designed as a fully fledged theory of integration nor even as an evaluation of the overall progress of integration; for in relation to both of these the actual policies, and

above all their impact in bringing about integration, would be essential. Although my purpose will be served if this study leads to a better understanding of the evolution of Community structures and Community process and the concepts associated therewith, it may also be regarded as a building block in the way towards a revived general theory of integration since it is within these structures and by these processes that substantive integration will have taken place and might take place in the future.

Second, neither the entire political gamut nor even the whole range of constitutional law receive full treatment. Thus, I have only slightly referred to, say, national party politics and in the treatment of the judicial system I have not delved with depth into questions regarding standing, grounds for illegality, etc., except where these were important to understand judicial review as a system of compliance.

Finally, even in respect of my principal approach -- the interaction of law and politics -- a measure of caution is necessary. The model I have adopted is neither exclusively a simple two-way model of cause and effect nor, once again, exclusively a functional model in which external requirements determine the internal organization of the system and relations therein. To

begin with we must always bear in mind other variables, social, economic and psycho-political, which receive only limited attention here but which certainly influence the system. Law and politics and their mutual interaction can only provide part, albeit an important part, of a full explanation to the changing structures and processes of the Community. But even within the parameters of law and politics the dynamics are not exclusively interactive. Indeed in analysing legal and political process I will try to show that many of the changes follow their own legal or political internal logic. The interaction is an additional supportive facet which complements, sharpens and renders more subtle our understanding. Inevitably, and almost tautologically, my analysis is concerned with change -- with process over time. In this sense the treatment is historical and even evolutionist. This evolutionism is certainly not Darwinian in the sense of having a fixed mechanism of adaptation, a principle of mutation and/^alinear progression towards betterment. Rather, if anything, it is more of a model in which tensions resolve themselves into an equilibrium which in turn generates new tensions in a continuous dialectical cycle. It is this system of tension and its resolution, equilibria and disequilibria, which we can now turn to examine.

FOOTNOTES

1. Given the measure of institutional integration among the three European Communities I shall refer to the combined structure as "the Community".
2. The Treaty Establishing the European Coal and Steel Community (hereinafter: Treaty of Paris) which launched the Community experience was signed in Paris on April 18, 1951. Treaties establishing the European Economic Community (hereinafter: Treaty of Rome) and the European Atomic Energy Community (hereinafter: Euratom) were signed in Rome on March 25, 1957. The Schuman Declaration of May 9th, 1950 may be regarded as the starting point: See 5/6 European Community 3 (1980) and see also, 13 Bull E.C. 1.2.1. (1980).
3. The treatment here will be confined solely to the Community experience although other regional organizations such as the Council of Europe have undoubtedly played a role in European integration and display certain supranational features. See, e.g., Drzemczewski, The Sui Generis Nature of the European Convention on

Human Rights, 29 I.C.L.Q. 54 (1980).

4. Shapiro, Comparative Law and Comparative Politics, 53 Southern California L. Rev. 537 at 538 (1980). In his comment Shapiro alludes to what in the strict legal sense is an excellent paper: Barav, The Judicial Power of the European Economic Community, 53 Southern California L. Rev. 461 (1980).
5. In one of the earliest studies of the Community as an emerging "federal" system the learned editor suggests that the very content of the concepts "... invites collaboration among disciplines, particularly of students and practitioners of the law and political science". A.W. Macmahon, (ed.) Federalism, Mature and Emergent (Doubleday, N.Y., 1955) at VII.
6. The apex of this effort may be represented by L.N. Lindberg and S.A. Scheingold, Europe's Would be Polity: Patterns of Change in the European Community (Prentice Hall,

Englewood Cliffs, 1970; prominent analyses which sought to combine law and politics were S.A. Scheingold, The Rule of Law in European Integration (Greenwood Press, Westport, 1976 reprint of Yale Univ. Press, 1965); S.A. Scheingold, The Law in Political Integration (Harvard Univ. Center for International Affairs, Harvard, 1971); other works of importance narrower disciplinary approach but of a / are E.B. Haas, The Uniting of Europe: Political Social and Economic Forces, 1950-1957 (Stanford Univ. Press, Stanford, 1958). E.B. Haas, Beyond the Nation State: Functionalism and International Organization (Stanford Univ. Press, Stanford, 1964). K.W. Deutsch et.al., Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience (Princeton Univ. Press, Princeton, 1968). A useful bibliography of research efforts in the first two decades of European integration has been compiled by Haas in 24 International Organization 1003 (1970).

7. See e.g., E. Haas, The Obsolescence of Regional Integration Theory (Institute of International Studies, University of California, Berkeley,

1975).

This process of crisis in integration theories is ably described by Greilsammer, Theorising European Integration in its Four Periods, 2 The Jerusalem Journal of International Relations 129 (1976).

8. In making this observation no overall criticism is necessarily implied. Sectoral analyses have the potential of achieving a level of detailed profundity which no general treatment can match. And in, say, the legal field the tremendous growth in Community law had created a definite need for the specialized legal texts; many of those now available display the highest measure of scholarship.

9. E.g., D. Lasok & P. Soldatos, The European Communities in Action (Bruylant, Brussels, 1981).

10. Greece acceded formally on January 1, 1981.

The Treaty of Accession was signed in Athens on May 28, 1979. For details of the conditions of accession and the main provisions in that Treaty, see 12 Bulletin of European Communities 1.1.1 - 1.1.19 (1979). See also Fatouros, Greece Joins the Communities, 6 E.L.Rev. 495 (1981); Evrigenis, Legal and Constitutional Implications of Greek Accession to the European Communities, 17 C.M.L.Rev. 157 (1980). Spain and Portugal are candidates for accession within this decade.

11. For a useful analysis of the possible impact of, and problems created by, accession, see D. Marguendé, Parliament for Europe (Jonathan Cape, London, 1979) esp. at 30-33. See also, L. Tsoukalis, The European Community and Mediterranean Enlargement (George Allen & Unwin, London, 1981).

12. One should not of course exaggerate the potential for direct or immediate change in the institutional balance which the new directly elected Parliament

may have. For a restrained and cautious analysis emphasizing "... the limits to the influence upon public policy of a directly elected European Parliament", see The Policy Implications of Direct Elections (various authors), 17 Journal of Common Market Studies 281-349 (1979). At the same time the Parliament has already exhibited its political aggressiveness and legal astuteness. The focal point for Parliamentary activity has become, naturally, the annual budget exercise. Parliament started in 1979 by rejecting the budget in toto but soon learnt that this was too clumsy a move more likely to harm the Community and even Parliament itself. Subsequently it has adopted more subtle measures: In 1980 Parliament voted an increased supplementary budget deliberately so as to be able to use unspent surpluses in 1981 (see 16 European Parliament Column 1 (1980)). This move was particularly astute since it exploited disagreement among the governments of the Member States in the Council of Ministers thereby allowing Parliament to take special advantage of the particular budgetary voting rules.

The 1980 action precipitated a political and legal crisis whereby Belgium, France and Germany threatened to refuse to make their full Community budgetary contributions and which was solved only a year later. In the 1981 Budgetary exercise the directly elected chamber unilaterally reclassified certain items of expenditure (food aid) as non-compulsory so as to give Parliament the final say on financial allocations. As a result the Council has decided to sue Parliament.

On institutional conflict regarding the budget, see generally Ehlermann, Conflict in Implementation of Community Law, 3 E.I.D.E. Reports 3.1 (Sweet & Maxwell, London 1980). In addition, Parliament has been testing its constitutional position in the decision making process. See e.g., its intervention in the Isoglucose cases (Case 138/79 Roquette Frères v Council; Case 139/79 Maizena v Council [1980] ECR 3333; 3393 (Comment, Jacobs, 18 CMLRev 219 (1980)).

13. Parliament itself has now produced an entire range of proposals for institutional modifications.

Some of these are of a limited nature not necessitating Treaty modification. See, e.g., E.P. Doc. 1-207/81; 1-216/81; 1-335/81; 1-206/81 and Resolutions of 9.7.1981, O.J Annex 1-273, 192 ff. More radical suggestions, involving Treaty amendment, are being prepared by a newly established Committee of the European Parliament.

14. "For years the Community has been described as being in crisis. But when crises exist permanently, merely changing their immediate causes, it should be asked if they really are crises, that is to say exceptional conflict situations. It is rather more likely that the conflicts the Community has so far experienced are significant of tensions inherent in the integration process itself". Everling, Possibilities and Limits of European Integration, 18 Journal of Common Market Studies 217 at 217 (1980).

Whilst I accept Everling's analysis of the Community as a system of crises my argument is not that the present problems and challenges are inherently more difficult than previous

ones, but rather that conditions for solution -- such as the present economic climate -- have worsened.

15. Of course when assessing the Labour Party decision, allowance must be made for the traditional licence of Opposition parties out of Government. As for the Debrè-Foyer Bill (Proposition de Loi portant rétablissement de la souveraineté de la République en matière d'énergie nucléaire, No. 917, Assemblée Nationale, 2ème session extraordinaire de 1978-1979) the election of a socialist government in France, apparently committed to the European enterprise, has solved the immediate problem but not the deeper roots. On recent popular attitudes to the Community, see Eurobaromètre No. 15, June, 1981.

16. See in general Chapter 10 infra.

We must distinguish between several types of Community law infraction by states. Most common are cases of non-incorporation into the legal orders of Community directives.

—————→ Then come inadvertent "pre-litigation" legislative or administrative

violations. Less common are deliberate infractions such as the French-Italian 1961 "wine war". Effective judicial remedy in respect of these is usually available. "Post litigation" defiance may consist in dilatory compliance by the Member States (e.g., Case 7/68 Commission v Italian Republic [1968] ECR 4) or even outright defiance (e.g., Case 232/78 Commission v French Republic [1979] ECR 2729. Cf. Joined Cases 24/80R and 97/80R Commission v French Republic [1980] ECR 1319). In addition national courts may evasively apply Community law (e.g., Secretary of State for the Home Department, ex parte Santillo [1981] 2 AllER 917) or even deliberately defy it (e.g., Cohn-Bendit Case, Conseil d'Etat [CE] 22 December 1978, Dalloz [D] 1979, 155. The cases of deliberate judicial and executive defiance are of course most troublesome. See 'Editorial Comment', 17 CMLRev 311 (1980).

17. Note 15 supra.

18. In the sixties these were fairly frequent. See e.g., Heathcote, The Crisis of European Supranationality, 5 Journal of Common Market Studies 140 (1966) esp. at 170. But even very recently Ralf Dahrendorf speaks of a "dismal

failure of institutions" and of the danger of "irrelevance". R. Dahrendorf, A Third Europe, (Third Jean Monnet Lecture, European University Institute, Florence, 1979).

19. Thus, e.g., successes in the environmental field -- for which no explicit basis exists within the Treaty -- probably outstrip the relative failure of the Community to evolve a Common Transport Policy as provided in Title IV of the Treaty (Articles 74-84 EEC).
20. An excellent analysis of this expansion is Tizzano, Lo Sviluppo Delle Competenze Materiali Delle Comunità Europee, 21 Rivista di Diritto Europeo 139 (1981).
21. For a useful analysis of this particular duality, see Marquand, Parliamentary Accountability and the European Community, 19 Journal of Common Market Studies 221 (1981) esp. at 223-226.

22. Dahrendorf, note 18 supra at 8 (emphasis in original).
23. See e.g., proposals for reform by the European Parliament, note 12 supra; Report on European Institutions (Three Wise Men Report) (Council of the European Communities, Brussels, 1980); Proposals for Reform of the Commission of the European Communities and its Services (Spierenburg Report) (Commission of the European Communities, Brussels, 1979). For academic commentary see recently, Rosenthal & Puchala, Decisional Systems, Adaptiveness and European Decisionmaking, 440 Annals, AAPSS 54 (1978); Tizzano, COREPER, in Novissimo Digesto Italiano, (Utet, Torino, 1981); M. Bangemann, Report of the "Three Wise Men": A Critical Assessment (European Cooperation Fund, Brussels, 1980); S. Henig, Power and Decision in Europe (Europotentials Press, London, 1980); C. Sasse et al., Decisionmaking in the European Communities.

24. A profound book which repays careful study is, C.J. Mann, The Function of Judicial Decision in European Economic Integration (Nijhoff, The Hague, 1972); see also A.W. Green, Political Integration by Jurisprudence (Sijthoff, Leiden, 1969).
25. See infra Chapter 1.
26. In most studies relationships in non-unitary systems are usually described in terms of central-periphery. I prefer Elazar's terminology of a general power since in non-dualistic analyses of such systems it is difficult to locate one centre for all system functions. Cf. Elazar, The Role of Federalism in Political Integration, in D.J. Elazar, (ed.), Federalism and Political Integration (Turtledove, Ramat Gan, 1979) at 13.
27. I have borrowed this term from Professor Stein to stress the intergovernmental function and procedure of this body. "The Representatives of the Member States meeting in the Council" are of course a different matter.
- See Stein, Towards a European Foreign Policy,

P a r t O n e

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Norms and Actors

What then do we mean when speaking of a supranational system? And does it still make sense to refer to the Communities, in the 80s, as such a system? The term supranationalism is evocative of an earlier era of high aspirations which seems at odds with recent developments already mentioned in the introduction: A resurgence of overt national political resistance to the Community, a less open but even more dangerous measure of non compliance with Community obligations and a continuous cycle of political crises the solutions to which often seem elusive. And yet, as I suggested, despite all this, the Community still displays a surprising measure of institutional resilience, an impressive record of substantive integration and a relevance in fields--such as foreign policy--not originally contemplated in the Treaty.

On the one hand to speak of the Community as supranational in the literal meaning of ". . . over and above individual states"¹ gives too general and antiquated a notion of the system. For we know that whatever the dreams of the past, the Community's present structure and process involve "bits and pieces of the national governments"² with a crucial

say in all aspects of Community activity. But even so in the transfer of certain functions to Community organs and in relation to certain constitutional hierarchies there remains a measure of "aboveness" in the old sense. Further, like all "federal"³ models, the Community presents a tension between the whole and the parts, centrifugal and centripetal forces, central Community organs and Member States. In some ways the balancing of this tension in the Community system departs, perhaps even radically, from most other federal models. The primary purpose of this part of the study will be to examine the evolution of these tensions with a view to explaining in what sense, if at all, one may still speak of a Community "aboveness". The analysis will be limited to the legal structure and political process of Community decision making and will not deal with any substantive field.

I shall be concerned to see whether through this analysis we might not find the elements for a working hypothesis as to what are the necessary characteristics which render a system supranational.

Notes

1. Robertson, Legal Problems of European Integration,
91 RDC 105, 143 (1957).
2. A. Shonfield, Europe: Journey to an Unknown Des-
tination (Allen Lane, London, 1972) at 17.
3. In this context I am using the term "federal" in
its widest, most fundamental sense of sharing in
governance over activities. Elazar usefully re-
cords the origins of the term

. . . first in the biblical hebrew term brit,
then the latin foedus (literally 'covenant'),
from which the modern 'federal' is derived
. . . . Elaborated by the Calvinists in
their federal theology, the concept formed
the basis for far more than a form of politi-
cal organization /T/he original use
of the term deals with contractual linkages
that involve power sharing--among individu-
als, among groups, among states. This usage
is more appropriate than the definition of
modern federations, which represents only one
aspect of the federal idea and one applica-
tion of the federal principle.

D. Elazar (ed.), Self Rule/Shared Rule (Turtle-
dove, Ramat Gan, 1979) at 3.

This overview of the federal principle is
particularly important since although the Community

is, in this wide sense, a "federal" entity, it decidedly does not conform to the traditional notion of having (or aspiring to have) a strong important centre and a periphery linked thereto.

Chapter One

Supranationalism: A Conceptual Conundrum

Although supranationalism is a term well established in the political and legal lexicon its usage is not unambiguous or without difficulty. It is possible to identify four interconnected issues around which these difficulties and ambiguities revolve.

A. Supranationalism: The Amorphous Concept

a. The definitional problem

The need to revert to a novel term in characterising the Community was indication that existing terminology was not felt to give adequate expression to the new venture.¹ But since the new term, supranationalism, derives from, indeed is the explication of, the phenomenon it seeks to define a measure of circularity is inevitable. For one must employ the distinguishing features of the Community to give meaning to the term supranationalism which in turn is the concept used to express distinctions between the Community and other international organisations. Thus, to the extent that the European Community experience was and remains unique one cannot usefully

speak of a strict definition but only of one or more hallmarks which either identify it with, or--more importantly--distinguish it from other forms of association of states and legal orders.² In the earlier analyses the concept was tackled by reference to the known juridical-political categories of public international law (which embodies the formal traditional modes of international relations) and municipal law (which embodies the variety of non-unitary state arrangements).

In a powerful study of synthesis, Hay³ analyses the most important of these attempts.⁴ Few writers adopted extreme positions of total assimilation.⁵ More often the analyses, using an analogical method, characterised supranationalism as veering towards one or the other of the two known systems. Insistence on finding a positive definition could only resolve itself in characterising the system as sui-generis. But to so characterise it with no more is hardly helpful.⁶ And to say more leads inevitably to the necessity of fixing the distinguishing marks. Thus although the current trend is to include the Community among international organisations its distinguishing supranational character--whatever this may be--is always emphasised.⁷

Even if one cannot, as a result, have a fully fledged definition, the exercise of determining the most relevant hallmarks as indicia for supranationalism ^(a "soft definition") remains of interest. First, these may serve as a significant comparative tool for evaluating the similarities and differences between on the one hand both older and novel associations of states and on the other hand the European Community. Also, should a true pattern of resemblance between other such associations and international organizations and the Community begin to emerge, the hallmarks may become a proper definition.

Secondly, in relation to the European experience itself, the hallmarks may provide a tool which will enable us to tackle the problem deriving from the dynamic nature of the Community and supranationalism.

b. The dynamic nature of supranationalism--the Community experience as a process

In attempting to fix certain distinguishing features there is a danger of failing to give expression to the dynamic nature of supranationalism. The Community experience has not been a static one, neither in the substantive activities pursued by it nor--more significantly for our discussion--in the internal

principles of its operation be they in the institutional framework, the location and exercise of decision making power, and, generally, the relationships between the Community as a whole and its constituent parts. The interplay of centripetal and centrifugal forces--manifesting itself in different equilibria at different times--is a constant feature of the Community as a "federal" creature. Indeed, as will be readily accepted, in many ways the Community can only be understood as a type of dialectical process of action and reaction among the various forces shaping it. This poses a double edged problem: one may select hallmarks reflecting the evolution of the Community at a fixed point in time. But with the passage of time these may be overtaken by events and cease to give a true reflection of supranationalism. Thus, for instance, studies which concentrated--as the primary distinguishing factor--on the ability of Community organs to take decisions immediately binding on individuals within the national legal systems⁸ would, today, in the light of subsequent developments in the Community, no longer reflect the mature evolution of that factor. Alternatively, a completely fluid set of hallmarks constantly chang-

ing with events would become no more than a description thereby losing its value as a comparative tool and its potential as an embryonic definition the importance of which was underlined above.

A compromise could be to shape as a dynamic tool a set of criteria within which the hallmarks would feature. The criteria would be sufficiently wide so as to be applicable to different legal orders and international organisations and so maintain their utility in comparative analysis. The hallmarks related to these criteria but changing with the evolution of the Community would provide the elastic element enabling us to understand supranationalism as a processual rather than fixed relationship or structure. This feature is particularly important in a retrospective analysis. The processual character highlights, however, two further difficulties: the cleavage between legal and political assessment and the diffuse nature of the term supranationalism.

c. Evaluating the supranational process - The
cleavage between political and legal assessment

Acceptance of the processual character of supranationalism and its subject, European Integration,

entails the possibility of evaluating it in the sense of establishing, with whatever measure of precision, the progress or retrogression of supranationalism and integration. It has been common to divide the process of European integration into "phases" and "periods" characterised by different degrees and levels of supranationalisation and integration.⁹ So as to avoid confusion in illustrating the legal-political cleavage it is necessary to draw a distinction between European integration and supranationalism. "European integration" is a concept wider than supranationalism for whereas the focus of the latter is on the constitutional, institutional and decision making process within the Community, the former incorporates these processes but includes also the substantive developments in the areas covered by Community activities and their social and economic impact on the system as a whole. In this sense it could be said that supranationalism is concerned with the "means" and European integration with the totality of social, political and economic results. The separation is, naturally, not total since a strengthening of the means available for substantive integration, e.g. establishing that Community measures in general override national measures,

ment. Thus, a diagnosis of stagnation in European integration as a whole would seem necessarily to entail a stagnation in the process of supranationalisation. Conversely substantial progress of supranationalism would indicate progress in an important facet of European integration generally.¹⁰

The cleavage between the legal and political evaluation of the progress of European integration and supranationalism is most apparent by reference to contrasting assessments of different "phases" in the process.

The chasm appears both in the choice of phases and, more strikingly, in the evaluation of progress. Thus in a useful study synthesising three decades of political theories on European integration, the period of 1958-1969 is signalled out as a "distinct phase".¹¹ Evaluating this period the learned writer comments that "Throughout /these/ eleven years during which General de Gaulle /who was "allergic to anything supranational"/ remained in power, no notable progress could be made in integration, either in the political domain, the institutional domain, the monetary domain or in the geographical extension of the Common Market".¹² Yet, from the juridical point of view--as

shall be analysed in detail below--it was precisely during this period that certain fundamental facets of supranationalism took crucial, even revolutionary, strides ahead establishing, e.g., the doctrines of direct effect and supremacy of Community law.¹³

This, of course, is not a unique example of the cleavage.¹⁴ To be sure the departure point of each discipline is different. The political theories of European integration were to a large measure wedded to a certain notion about the outcome of the process and embodied to a larger or smaller extent a certain predictive element about continuous progress. In addition political theory laid great emphasis on the social, political and economic substantive achievements and lesser emphasis on means and ways. The starting point was thus one of high expectation and failure to maintain the visible social political momentum led to a measure of disillusion in the reassessment of European integration.¹⁵

The juridical point of departure was different. The constituent instruments of the Communities were traditional multi-partite international treaties which even if including certain novel institutional features were, in line with precedent, expected to

of treaty interpretation one of which is, for example, a presumption against loss of sovereignty by states. The process of integration which in the legal sphere was accomplished by a "constitutionalisation" of the Treaties¹⁶ was set against limited initial expectations. This conditioned among lawyers a far more positive evaluation of the process.¹⁷ Besides, legal preoccupation especially in Europe has been concerned traditionally with means and tools, the legal instruments, and somewhat less with their political-social impact. Important as the supranational developments were, they formed only part of the total picture of European integration.

This attitudinal explanation cannot obscure the fact that in dealing with the same subject matter, such a cleavage has emerged. Thus even in reviewing the narrower instrumental notion of supranationalism one of our concerns must be to try and provide some mechanism which will bridge, at least partially, this cleavage.

Finally, the existence of the cleavage within the context of the processual character of supranationalism, points to the last difficulty deriving from the complex nature of the term.

d. The "diffuse" nature of supranationalism

In discussing the definitional problem we noted the need to rely on a multiplicity of distinguishing attributes--hallmarks--to give meaning to the term. We also noted the evolutionary nature of supranationalism reflecting the developments in the Community.

But how are these two factors to be related? The difficulty may best be illustrated by reference to the relationship between sovereignty and supranationalism.

Hay correctly suggests that "With few exceptions, . . . the criteria for the loss of sovereignty coincide with those which much of the literature regards as the elements of supranationalism. Thus, the concept of a transfer of sovereignty may be the legal-analytical counterpart of the political-descriptive notion of supranationalism".¹⁸

The criteria which Hay distilled from the literature as elements of supranationalism include one or more of the following:

- i) The "independence of the organisation and of its institutions from the member states . . .".

- ii) The "... ability of an organisation to bind its member states by a majority or weighted majority vote".
- iii) The "... direct binding effect of law emanating from the organisation on natural and legal persons".
- iv) The attribution to the organisation of certain powers, functions and jurisdictions which in terms of sheer quantity result in a qualitative difference from non-supranational organisations.
- v) The nature of supranational institutions-- principally the Parliament and Court.¹⁹

It is not necessary at this stage to examine in depth these criteria and evaluate the extent, if any, to which they fulfil a distinguishing function and meet the other problems mentioned above.

In general, in trying to choose the most apt hallmark one could of course focus on a single criterion such as the creation of a parliament or court as representing the most critical distinguishing factor and evaluate the process by reference to this single factor. The danger there would

naturally be one of missing the complexity of su-

pranationalism and indeed of European integration. The political-legal cleavage described above can, in some cases, be explained by an emphasis on one or some of the criteria to the exclusion of others by political scientists and jurists respectively. By selecting a multiplicity of factors a different danger is created--that of treating them as an integrated complex progressing or retrogressing as one whole.²⁰ A cursory examination of the list of criteria cited above will reveal that it is quite possible that in respect of some there may be "a loss of sovereignty" whereas in relation to others much less or none at all.

How then is one to evaluate the progress or retrogression of supranationalism? To recognise the complexity of supranationalism which calls for a multiplicity of factors but to fail to realise that the processual character may take a different evolutionary direction in relation to each of these factors is to deny the diffuse nature of the term and to deprive the dynamic analysis of one of its important elements.

B. Normative and Decisional Supranationalism

In order to overcome some of the difficulties outlined above it is submitted that a distinction should be drawn--if only for use as an analysis tool--between two facets of supranationalism. For convenience, I shall call them normative and decisional.²¹

Normative supranationalism is concerned with the relationships and hierarchy which exist between Community policies and legal measures on the one hand and competing policies and legal measures of the Member States on the other. Decisional supranationalism relates to the institutional framework and decision making processes by which Community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed.²² The make up of both these terms may include factors which can be stated at sufficient a level of generalisation so as to serve as criteria for evaluating the progress or retrogression of the two particular facets of supranationalism.

A high measure of normative supranationalism

will denote, in general, a hierarchy in which Commu-

nity measures will take effective precedence over national ones. The choice of criteria is relatively simple since we may use the traditional principles by which relationships between on the one hand national and/or state law and, on the other, federal, confederal and international law are expressed: The principle of self-execution (direct effect), the principle of supremacy and the principle of preemption. The hallmarks will be the specific manifestation in the Community of these principles.

The centrality of the Member States in the institutional set-up and the absence of an autonomous popularly elected 'Community legislature and government' were basic structural choices taken when setting up the Community. Yet the institutional structure projected in the Treaty may be seen as an attempt to achieve a model of 'Community decision making' which despite the centrality of Member States would depart as far as possible from traditional diplomacy and intergovernmentalism and would, in the literal sense, be supranational (or at least above the individual state). In the Community context a high measure of decisional supranationalism would thus be indicated in relation to decisions taken

- a. by Community organs the composition and mode of operation of which are autonomous (communautaire) and not intergovernmental in the traditional sense,
 - or b. by Community organs the composition and political functions of which are intergovernmental but the process of decision making-- e.g. the voting procedures--is not strictly that of intergovernmental diplomacy,
 - or c. in pluri-institutional decision making where the role of the autonomous organs may be said to be critical,
- and in which the execution of these measures will be
- d. either directly by, or under the supervisory authority and responsibility of, the autonomous bodies.²³

Although all four factors are expressed in relation to the institutions of the Community, by virtue of the composition of these institutions, they contain the involvement, both direct and indirect, of the Member States in the decision making process.

The separate treatment of these two facets covers the essence, if not the detail, of both the "juridical approach which focuses on formal relation"

ships, demarcation of competences and resolution of conflicts, and the "political" approach which is concerned with the actualities, influenced by legal and non-legal factors, of cooperation and coordination of the different elements in the association of states. Having a clearer view of developments in both spheres may be helpful in drawing composite conclusions.

The other major relationship between Member States and the Community concerning the question of competences is dealt with in Part Two of this study.

Having introduced these distinctions it is now possible to analyse and trace the dynamic nature of supranationalism as a key to understanding the evolution of the legal-political framework of the Community.

C. The Dynamics of Normative and Decisional Supranationalism: Diverging Trends And A Resulting Balance

Examination of the European Community's evolution in the last three decades reveals the apparently paradoxical emergence of two conflicting trends. One may have expected in the process of integration a parallel evolution in the transfer of power from the periphery to the centre--an increase in central nor-

mative competence accompanied by a strengthening in the "centralised" decision making process. In the Community, however, we can trace on the one hand a, more or less, continuous process of approfondissement of normative supranationalism whereby the relationship between the (legal) order of the Community and that of the Member States has come to resemble increasingly a fully fledged (USA type) federal system. On the other hand, and contemporaneously, we can detect a, more or less, continuous process of diminution of decisional supranationalism, stopping, in some respects, only short of traditional intergovernmentalism. The very existence of supranationalism--in both its forms--in itself distinguishes the Community from most other international organisations. The divergence in the evolution of the two forms may be one of the special--perhaps even unique--features of the Community as a process of integration and as a form of governance. The possible meaning to be given to these diverging Community trends will be discussed and assessed below. First, however, we should turn to examine in greater detail the two facets of supranationalism with a view both to a clearer understanding of their meaning and so as to illustrate the re-

Notes

1. The Community is new in the post-World War II period. The 19th century German Zollverein (Keeton, The Zollverein and the Common Market, in Keeton & Schwarzenberger (eds.), English Law and the Common Market (Stevens and Sons, London, 1963) 1) and the Danube Commission (Smith, Danube, 4 Yearbook of World Affairs (1950) 191) were two antecedents in earlier days. The term supranationalism also predates the Community. Schermers cites Einstein as writing to Freud in 1932 and stating "At present we are far from possessing any supranational organization." H.G. Schermers, International Institutional Law, Vol. 1 (Sijthoff, Leiden, 1972) at 20. It is, of course, possible to adopt an a-priori definition but this theoretical approach depends on a choice of criteria which will necessarily be subjective. Schermers prefers this approach adopting a useful list of such criteria but even he is then pushed to conclude that since to be "completely supranational, an international organization should fulfil all these criteria" . . . no such supranational organization exists".

proach relying on the experience of the Community itself even if the result is not as theoretically satisfying as the a-priori method. See also, G. Mally, The European Community in Perspective (Lexington Books, Lexington, 1973) esp. at 26.

2. This is perhaps my bias as a Common Law lawyer:

"The pursuit of definitions has never appealed much to lawyers because they are aware that the concepts they employ have been rough-hewn by history and stoutly resist philosophical formulation." Pollock, The Distinguishing Mark of Crime, 22 M.L.R. 495 (1959).

3. P. Hay, Federalism and Supranational Organizations (University of Illinois Press, Urbana and London, 1966). In its historical synthesis parts Hay's study offers the most exhaustive treatment of different studies of supranationalism especially in its legal and institutional aspects. Moreover, the analytical parts of the study have retained their value despite the passage of years. Even today the book repays careful study. I have relied on Hay for the brief survey of dif-

4. Id. chapter 2 and appendices pp. 77-78.
5. See, e.g. Nørgaard, The Position of the Individual in International Law (Munksgaard, Copenhagen, 1962) (International Law Approach) and Kohnstamm, The European Coal and Steel Community 90 RDC 1 (1956 II) and comments thereon in Hay, id.
6. ". . . an unsatisfying shrug" Hay, Federal Jurisdiction of the Common Market Court 12 Am. J. Com. L. (1963) at 39. Cf. Hay id. at 44 and note 106.
7. Thus in a leading current treatment Schermers has no hesitation in including the Community in his general treatise on international institutional law but he is careful to distinguish between supranational and intergovernmental organisations. See Schermers, note 1 supra at 19-24.
8. E.g. Robertson, Legal Problems of European Integration, 91 RDC 105, 143 (1957).
9. In their comprehensive collection of texts, cases and readings, Stein, Hay and Waelbroeck suggest

wards Integration by Sectors 1950-1955; Relaunching 1955-1958; A Split--A Bridge--Political "Relaunching"? 1958-1963; Crisis-Consolidation 1963-1968; Enlargement 1969-). E. Stein, P. Hay, M. Waelbroeck, European Community Law and Institutions in Perspective (Bobbs-Merrill, Indianapolis, New York, 1956) pp. 10-13. Greilsammer, suggesting that "t/here is virtually no process that can be delimited in time as well as the process of European integration" opts for four periods 1946-1950; 1950-1958; 1958-1969; 1969-

. Greilsammer, Theorizing European Integration in its Four Periods 2 The Jerusalem Journal of International Relations 129 (1976) (for the evaluation of the different periods see text to notes 25-26 infra). Dahrendorf suggests three less well-defined phases: The Founding Fathers--Monnet et al. (approx. 50s); Founding sons--Hallstein et al. (approx. 60s), and the present generation. R. Dahrendorf, A Third Europe? (E.U.I., Florence, 1979--Jean Monnet Lecture).

Pryce also suggests six phases although different from Stein et al.: 1950-51; 1952-54; 1955-57 (Relance); 1958-62 (New Communities in

tion); 1969-72 (Second Relance). R. Pryce, The Politics of the European Community (Butterworths, London, 1973) at 1-27.

10. Stagnation of supranationalism, however, does not imply stagnation of substantive integration.
11. Greilsammer id.
12. At 141 (emphasis added).
13. The major decision on direct effect was given on February 5, 1963. On supremacy on July 15th, 1964. For more detailed discussion, see chapter 2 infra.
14. The period of De Gaulle in which UK accession was rejected (on a French "veto") and in which the Luxemburg crisis occurred created a general overhaul of theories of integration. See e.g. Haas, The Uniting of Europe and the Uniting of Latin America 5 Journal of Common Market Studies 315 (1967) at 325-331.

An extremely pessimistic assessment in the

tional structures may not survive into 1966"--is that of Heathcote, The Crisis of European Supranationality, 5 Journal of Common Market Studies 140 (1966). The analysis, strongly influenced by the political crises of that period, is instructive in illustrating the cleavage. Heathcote, at 141, adopts an a priori definition of supranationality according to which "a supranational organisation is one which (a) bypasses the nation-state's authority and deals directly with the citizens; which (b) takes over some functions traditionally exercised by the nation-state; and (c) is in the position to originate decisions not only on behalf of the state but despite it". It is interesting that there is almost exclusive concentration on the decision making actors and processes and only oblique--if at all--reference to the validity and status of the decisions adopted vis-à-vis national measures. The latter are the traditional preoccupations of the lawyer. And yet without this latter type of validity the power to originate measures despite Member State opposition would have precarious value if these measures could subsequently be overturned by a

criterion,--the authority to deal directly with the individual--introduced already by the Treaty of Paris (a power which, incidentally, remained largely intact during the Sixties) has been overtaken by developments in the Sixties by decisions on self-executing measures and supremacy which are more revolutionary, have greater impact and ~~could~~ far better serve as distinguishing criteria for supranational organisations.

Puchala, although dealing with the wider concept of international integration captures with his 'blind men and elephant' metaphor neatly, if somewhat acidly, the problem of the disciplinary cleavage: "Each blind man . . . touching a different part of the large animal, and each concluding that the elephant international integration had the appearance of the part he touched." Puchala, Of Blind Men, Elephants and International Integration, 10 Journal of Common Market Studies 267 (1972) at 267. His own sophisticated "concordance system" strangely pays little attention to the constitutional developments which could have been regarded as important supportive elements, at 277-284 but see at 269-

devastating remarks by Shapiro, supra Introduction p. 1.

15. Cf. Greilsammer, note 9 supra at 142-146.
16. "Constitutionalisation" implies a combined and circular process by which the Treaties were interpreted by techniques associated with constitutional documents rather than multipartite treaties and in which the Treaties both as cause and effect assumed the "higher law" attributes of a constitution. For an interesting discussion see Proceedings of the 72nd Annual Meeting of the American Society of International Law 166-197 (1978).

The German Federal Constitutional Court has actually said that "The European Economic Community Treaty is, as it were, the constitution of this Community" Federal Constitutional Court, First Chamber, Decision of October 18, 1967; [1967] AWD 477-78; [1968] Europarecht 134-37 cited by Stein in Proceedings id. 168. See now, Stein 75 AJIL 1 (1978).

18. Hay, note 3 supra, p. 69.
19. Hay, id., p. 31 ff.
20. Cf. P. Pescatore, The Law of Integration
(Sijthoff, Leiden, 1974). In his excellent study Judge Pescatore tends to play down the institutional crises (e.g. pp. 11-19) such as the Luxembourg accord. Consequently his treatment gives a general impression of continuing progressive evolution.
21. I prefer "decisional" to "institutional" since the former conveys the need to look at the actual processes and not merely at formal functions. Far more sophisticated tools and frameworks have been offered for the analysis of federal models in general and the Community model in particular. Elazar's series of matrixes is a recent most valuable contribution as regards the former (see, Elazar, The Role of Federalism in Political Integration, in D.J. Elazar (ed.), Federalism and Political Integration (Turtledove, Ramat Gan, 1979)
13). See also W.H. Riker, Federalism: Origin,

1964). Lindberg's model has become something of a classic as regards the latter (see Lindberg, The European Community as a Political System: Notes Toward the Construction of a Model 5 Journal of Common Market Studies 359 (1967) and L. Lindberg & S. Scheingold, Europe's Would-be Polity: Patterns of Change in the European Community (Prentice Hall, New Jersey, 1970)). The limited framework here is probably sufficient for our purposes since it concentrates on supranationalism in its instrumental facet and not on the uses to which it has been put in the evolvement of substantive policies and the evaluation thereof. The limited framework will also enable me, in the confines of this essay, to flesh it out so that it does not remain too abstract.

22. A fully fledged decisional analysis would have to take separately each single policy, determine the factors, forces and actions relevant thereto and attempt to trace the decision making process.

Puchala, note 14 supra at 278, has constructed such a model as regards the agricultural sector.

Inevitably, this cannot be done here and I have

sis even if at a great sacrifice of sophistication. It is submitted however that the general Community analysis remains relevant to individual sectors. Naturally I do not claim that this framework can achieve precise measurement. It fails, thus, one of Deutsch's crucial tests for "theoretically powerful" models. (See K. Deutsch, The Nerves of Government (The Free Press of Glencoe, New York, 1963) Ch. 1.) Still, as providing a rough measuring instrument enabling at least the indications of trends it may be considered adequate for this retrospective analysis. Detailed frameworks such as Puchala's, carry the danger of remaining too theoretical and incapable of practical applications. Thus, in H. Wallace, N. Wallace & Webb (eds.), Policy Making in the European Community (John Wiley and Sons, London, 1976) which analyses policy making in specific fields, the authors, including Puchala himself, had to adopt less detailed frameworks.

23. Lindberg, in his "scale of decision locus", note 21 supra at 356-357, offers a more comprehensive breakdown along a ". . . continuum ranging from

the Community system" to "decisions taken entirely by the national systems individually". The full range consists of:

1. Decisions . . . taken entirely in the /EC/ system
2. Decisions . . . taken almost entirely in the /EC/ system
3. Decisions . . . taken predominantly in the European Community system, but the nation states play a significant role in decision making
4. Decisions are taken about equally in the European Community system and the nation-states
5. Decisions are taken predominantly by the nation states, but the European Community system plays a significant role in decision making
6. Decisions are taken almost entirely by the nation states
7. Decisions are taken entirely by the nation states individually

This model is less useful for us, since its main purpose is to determine in relation to a list of substantive functions which political systems fulfil, the degree to which the Community is "substituting" the Member States. In legal terms its purpose would be to delineate substantive Community jurisdiction and competence. It does not focus on the decision making process itself and thus its utility here may be questioned.

Since, if there is a measure of truth in the assessment ". . . that the Council /of Ministers/

is in fact no longer a Community Institution, but only a sort of clearing house for national interests, which by using the principle of unanimity prevents any further progress of the European Community" (Aigner, Member of the European Parliament, Debates of the European Parliament 10.7.80 p. 290 (English version), then in terms of the instrumental means of supranationalism, the fact that the locus of decision falls within Lindberg's first category, becomes less meaningful. Lindberg's "scale of peripheralization-centralization" (drawing on Riker) and of systems and subsystems goes some way towards this decisional analysis but is, again, too detailed to be of use in a limited survey.

Chapter Two

NORMATIVE SUPRANATIONALISM:

THE PROCESS OF APPROFONDISSEMENT

A. Self-Executing Measures -- The Doctrine of Direct Effect

The first distinguishing feature, or hallmark, of supranationalism in its early ECSC days was the power vested in the Community's main autonomous institution, the High Authority, to adopt self-executing measures which were directly binding on individuals -- mainly undertakings in the coal and steel sectors.^{1/} Once the Treaty of Paris was ratified by the Member States this power could be executed regardless of the monist or dualist character of the municipal legal order of the Member States. Hitherto, traditional international organizations had the powers "... to negotiate agreements ad referendum; ... to take decisions which were binding on the members^{2/} but which would depend on national governments for their implementation ... [and] to take decisions which the organization itself could implement".^{3/} The power of the Community's High Authority directly to bind individuals, subjects of national law, was, thus, a major innovation introduced by the Treaty of Paris which was acknowledged in most analyses of that period as the central characteristic of the Community. Despite the novelty of this feature, at least in modern

times,^{4/} the international law character of the Treaty of Paris remained largely unaffected, since this manifestation of self-executing rule-making power was explicitly agreed upon by the Member States which were signatories to the Treaty.

Later, however, this first characteristic of normative supranationalism was judicially developed in relation to the Treaty of Rome. In a series of landmark decisions the European Court of Justice, throughout the 60's and 70's took this doctrine far further than the limited provisions in the Treaties.^{5/}

It first held that subject to certain conditions, provisions of the Treaty of Rome -- a Treaty which on its face resembled other treaties establishing international organizations -- could by virtue of their self sufficiency (have direct effect) bestowing enforceable rights as between individuals and the Member States.^{6/} Important as this celebrated decision may be in relation to the substantive consequences which would follow in respect of all Treaty Articles which could be shown to satisfy the conditions for direct effect, the main interest lies in the fact that this was the first major step in the "constitutionalization" of the Treaty of Rome^{7/} -- its transformation by adopting a "constitutional interpretation" method into a quasi-constitution of the supranational entity. Implicit in the decision

of the Court was the notion that the Member States were bound in their internal legal orders by their international treaty obligations. No less revolutionary an aspect of the decision was the fact that this binding characteristic, derived from the reciprocal acceptance of the Treaty of all Member States, could not subsequently be dependent on reciprocal observance. Failure by a Member State to fulfil its obligations would lead to a remedy under the Treaty system but could not, in law, be used as an act which would release other Member States from their obligations. ^{Also} the individual was put, in certain respects, on a par with the state, a feature which usually appears only in municipal law. In other words, breach of international obligations, at least those which were self-executing and materially capable of bestowing rights on individuals, became a matter of internal law.

Thus, Member States, vis-à-vis individuals, could no longer break their international treaty obligations relying on the weakness of traditional public international law. This weakness was based in part on the exclusion of the individual as a direct subject of rights and duties (and of individual standing to sue) and on the traditional tardiness of states in bringing international claims on behalf of individuals when their national interest is not involved. The Court's ruling had thus another dimension since it gave a new vigilant and effi-

cient guardian to international obligations -- the individual.

Since that 1963 decision the doctrine of direct effect has been extended, deepened and has become a general rule of construction applicable to all Community law. Important steps in its evolution have been its extension to create directly enforceable Treaty rights between individuals inter-se^{8/} and its application, step by step, even to types of Community secondary legislation (e.g., directives) which are addressed to Member States and which on their face would not suggest the possibility of bestowing rights and duties on individuals.^{9/} The process of refinement continues to date.

The elaboration of this doctrine was absolutely fundamental to the subsequent evolution of the system and can, in many ways, be regarded as its cornerstone. Not only, as I have mentioned above, did it signify a new attitude by the Court to the constituent Treaties. Not only would it strengthen the system of vigilance and compliance. But it was also to start an irreversible evolutionary process for, as we shall see, it necessitated, in combination with the principle of uniformity which was enshrined in the Treaty (Article 177 EEC), the construction of the supremacy principle. And once the system had these twin concepts established it would have to contend with the issue of preemption. At an even more pro-

found level the coexistence of law creating agencies and a principle of direct effect which did not depend on reciprocity meant that the Community order established itself as a system of governance akin to municipal states rather than a source of normative obligations the execution of which would depend in all cases for the "translation" and intermediacy of national governments.

8. The Doctrine of Supremacy

During the same period the European Court evolved its second crucial doctrine, the doctrine of supremacy, which, again, encapsulates a major aspect, in this sphere, of fully fledged state-federal / ^{legal} systems. In another landmark case, Costa v ENEL,^{10/} the Court established a clear hierarchy of norms. In its view, which, according to the Treaty of Rome, is the authoritative view regarding the interpretation of that Treaty, Community law within the sphere of competence of the Community, be it primary or secondary, is superior to Member State law even if the latter is subsequently enacted and of a constitutional nature. As in the case of "direct effect", the derivation of supremacy from the Treaty depended on a "constitutional" rather than international law interpretation.^{11/} The Court's reasoning that supremacy was enshrined in the Treaty was contested by the Governments of Member States in this case and others. Acceptance of this view amounts

in effect to a quiet revolution in the legal orders of the Member States. For, in respect of any matter coming within the competence of the Community -- not always an easy matter to determine^{12/} -- the legal Grundnorm will have been effectively shifted, placing Community norms at the top of the legal pyramid.

It follows that the evolutionary nature of the doctrine of supremacy would -- necessarily -- be bi-dimensional. One dimension would be the elaboration of the parameters of the doctrine by the European Court. But full reception thereof, the second dimension, would depend on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts. It is relatively easy to trace the evolution of the Community dimension of the doctrine. In the Costa v ENEL decision, where it was launched, the Court was concerned with the paradigmatic conflict between substantive national and Community law. One may single out from the numerous cases in which it was affirmed the decisions in Walt Wilhelm^{13/} and Simmenthal^{14/} as illustrations of subsequent development. In the former, the Court accepted the possible legitimacy of a nation having a competing policy operating concurrently with the Community policy with each proceeding "... on the basis of the considerations peculiar to it".^{15/} Thus the issue was not about the possible coexistence of conflicting substantive law. But despite the legitimacy of

having a parallel national competition policy which the Court did not dispute, the principle of supremacy required that a national court in proceedings before it in cases of national competition law must keep an open eye that its decisions even in their procedural, civil or penal aspects would not prejudice any concurrent Community -- as yet incomplete -- proceedings.^{16/} In the Simmenthal case the issue was not whether supremacy should exist but which court, in the national order, would decide this. The European Court, controversially,^{17/} but seemingly consistently with its earlier jurisprudence, insisted on the immediacy of supremacy so that even national procedural rules which did not deny the ultimate supremacy of Community law but designated internal procedures as to the court in which the review of the national legislation should take place, were prohibited.^{18/} This was aiming at establishing supremacy not as a question of substantive conflict but as a principle which would dictate the replacement of national law.

As regards the second dimension, the evolutionary character of the process is more complicated. It should be remembered that in respect of the original Member States there was no specific constitutional preparation for this European Court inspired development. The process of approfondissement may be thus seen in the gradual acceptance of the doctrine by the "supreme courts"

of the Six. The pattern although uneven is clearly progressive. In some Member States the reception of the principle caused little problems (Benelux)^{19/} in others, the Courts accepted the doctrine with reservations regarding either the procedural implications of the doctrine (Italy) or the possible incompatibility of Community law with fundamental human rights enshrined in their constitutions (Italy, Germany).^{20/} Now that the European Court has indicated its willingness to review Community law itself in relation to a "higher law" of human rights based, in part, on the common constitutional traditions, these objections will have been somewhat quelled.^{21/} In others still, the judiciary split, with one branch accepting the doctrine and the other refusing it (France).^{22/} As regards the new Member States, especially those with a written constitution, the matter was simpler since at the time of accession supremacy was already an established principle and could be regulated formally in the process of accession.^{23/} The U.K. however presented a special problem since doubts remain as to the very theoretical possibility of a shift in the Grundnorm of the type discussed above. The problem derives from the lack of a written constitution and the conceptual difficulty of entrenching legislation -- such as an Act giving prospective supremacy to Community law -- so as to bind subsequent parliaments.^{24/} The matter is not fully resolved

since no clear case involving U.K. legislation contradicting earlier Community law has come before the higher courts. In those cases in which the House of Lords occupied itself with Community law^{25/} it has, judiciously, avoided making a direct pronouncement on the subject. The Court of Appeal under the tutelage of Lord Denning has been less inhibited; its pronouncements -- always obiter -- see-sawed but have now settled on a halfway-house acceptance.^{26/}

So far we have treated the doctrine of direct effect and supremacy as distinct concepts; whereas analytically -- linked by the Court's vision of the exigencies of a cohesive and integral legal order and its insistence on the principle of uniform interpretation and application of Community law -- the two are tightly connected; in this sense supremacy is consequential of direct effect. Consideration of this connection will highlight another aspect of the evolutive nature of normative supranationalism. In Van Gend en Loos the Commission of the European Communities in its submissions stated that

... analysis of the legal structure of the Treaty and of the legal system which it establishes shows ... that the Member States ... [intended] ... to establish a system of Community law and ... that they did not wish to withdraw the application of this law from the ordinary jurisdiction of the national courts ... [that Community law] must be effectively and uniformly

applied throughout the whole of the Community. The result is ... that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later.^{27/}

By contrast, the Advocate General in that case argued against the extension of direct effect to Treaty articles. He suggested that such extension -- at a time in which the principle of supremacy was not established (and according to his exhaustive comparative analysis at least in some Member States Treaty law was decidedly not supreme over national laws) -- would have the "... consequences of an uneven [non-uniform] development of the [substantive] law involved in the principle of direct application, consequences which do not accord with an essential aim of the Community".^{28/}

The Commission and Advocate General reached different conclusions in their submissions but were ad idem in seeing the inevitable linkage between supremacy and direct effect once the requirement for uniformity was acknowledged. It is submitted that the fact that the Court rejected this cue and preferred to introduce the two concepts into the Community legal order in two separate cases -- even if, inevitably, using the very similar "uniformity" argumentation -- indicated a deliberate and politically wise attempt to phase out

the progressive evolution of normative supranationalism so as to ensure as far as possible a smooth reception in the national legal and political orders. The strict connection between the two is evident also in Simmenthal where at times it is difficult to tell if the Court was applying the principle of supremacy or that of direct effect.

Both these episodes illustrate the inevitable logic and autonomous dynamism in the evolution of normative supranationalism. Later on we shall examine other, external, factors which might have influenced this evolution.

C. The Principle of Preemption^{29/}

It is here that one finds the third and final hallmark of normative supranationalism. In its purest and most extreme form preemption means that, in relation to fields in which the Community has policy making competence, the Member States are not only precluded from enacting legislation contradictory to Community law (by virtue of the doctrine of supremacy) but they are preempted from taking any action at all. Initially, before the full ripening of the doctrine, the European Court achieved this objective by its decisions which forbade the disguise of the Community nature of regulations.^{30/} This however was clearly insufficient. Subsequently, the principle came to its own even though

it is still in an evolutionary stage. The Court of Justice is striving to attain an equilibrium between, on the one hand, the wish to promote the policy making capacity of the Community (which is at the essence of the preemption doctrine) and, on the other hand, the pragmatic necessity of regulation in fields in which the Community has competence but in which -- for various reasons such as problems in its decision making processes -- it has not been able to evolve comprehensive Community policies. The Court has felt that in these situations the policy lacunae should be filled by Member State action implying a more flexible rendering of the pure preemption principle. In this the Court will be following in the footsteps of all federal systems, none of which apply pure preemption.

This shift in the Court's formulation may be illustrated by a number of decisions in the field of external economic relations. Whereas, at first, in the ERTA Case and OECD ~~Opinion~~ the Court emphatically adhered to the pure preemption principle, it moderated its stance in the later case of Kramer and ^{opinion on the} International Rubber Agreement. One of the questions in the ERTA Case^{31/} was whether the competence to negotiate and conclude an international agreement in the transport field rested in the Community or the Member States. Since, in its Transport Chapter, the Treaty does not refer specifically to Community competence to engage in international agreements, it was

argued that such matters were to be left within Member State powers. In a judgment the importance of which goes beyond the specific question before us, the Court laid down an emphatic absolute principle of preemption:

/E/ach time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.^{32/}

In the OECD Opinion^{33/} this emphatic statement was even strengthened whereby the Court said that the occupation of a field may be determined even by a mere external act of the Community, in the absence of any formal internal 'policy deferring' measure having preceded it (by the external act rather than by an initial internal measure):

A commercial policy is in fact made up by the combination and interaction of internal and external measures ... Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves.^{34/}

In the case of Kramer^{35/} there is a certain retreat from the earlier emphatic position in ERTA. The Court stated that despite the fact that the Community had adopted internal measures, these "... limit themselves to providing the Community institutions with the power to take measures similar to those which the Member States ... did take ... The Community not yet having fully exercised its functions in the matter ... the Member States had the power to assume commitments ... and ... the right to ensure the application of those commitments within the area of their jurisdiction."^{36/}

On the wide ERTA formula one may have expected absolute preemption and yet the Court in Kramer, mindful of the practical difficulties which such an approach might have had, was more lenient. This leniency was not, at that stage of the evolution of the principle, unqualified. The Court added that this concurrent Member States competence was transitional. The Treaties^{37/} had stipulated a deadline for the Council to adopt a fully fledged common policy and the prospect of adoption could have been an alternative explanation to the Court's pragmatic approach.

In the International Rubber Agreement ~~Opinion~~^{38/} the Court accepted concurrent jurisdiction of the Member States in a field "occupied" by the Community "if ... the financing (of the agreement in question) is to be by the Member States". The Court acknowledged however that as,

unlike Kramer "... no formal decision has been taken on the question [as to whether the Community of Member States should finance the agreement, and as] there is no certainty as regards the attitude of the various Member States.... The exclusive competence of the Community could not be envisaged in such a case.^{39/} Here we find a retreat even in respect of a policy the Community exclusiveness of which was already established. This pragmatic approach was accepted even without the definite future prospect of a common policy, and in general this approach was to replace the purist principle evoked in ERTA. A pragmatic approach implies inevitably more difficulties in the determination of parameters and in the application thereof. Only through successive court decisions will these be clarified.

On its face then it would seem that in relation to the principle of preemption there has been a retardation rather than a deepening of the scope of the principle in the Community legal order. For, in the terminology aptly adopted by Professor Waelbroeck, there seems to have been a shift by the Court from a "Conceptualist-federalist approach" which corresponds to preemption in its purest and most exclusive form to a "pragmatic approach" which leaves the Member States concurrent competence with the Community. It should first be pointed out that in its second approach the Court has

displayed, characteristically, a measure of political acumen. To insist on pure preemption when the Community institutions are not yet ready for their task could be retrogressive for the general evolution of the Community. At the same time the Court has insisted that in certain cases the pragmatic approach is transitory in nature. With the full occupation of a field by a Community policy, national measures (even if not contradictory and thus not in violation of the supremacy principle) could become prohibited per se. In other cases concurrent jurisdiction may remain constant. The approfondissement of preemption may thereby be explained in two ways. First, by its maturing from a crude even dogmatic statement of pure principle to a relatively sophisticated doctrine sensitive to Community needs. Secondly, preemption is seen to be spreading from one substantive field of Community law to another. It now affects sectors such as fisheries, competition policy and agriculture.^{40/}

d. The Evolution of Normative Supranationalism -- An Interim Assessment

The evolution of normative supranationalism has been both determined and rapid and, until recently, largely consistent. The moving force behind it, as we have seen, has been the European Court of Justice, the self perception

of its role in the process of integration being the key to understanding the development. As a supreme adjudicator in a non-unitary system in which inherent tensions exist between central institutions and the constituent member states, the Court of Justice had the choice between two different visions of its role. Article 164 EEC which charges the Court with ensuring "... that in the interpretation and application of the Treaty the law is observed" may indicate a vision in which the Court would be cast as an aloof and remote arbiter decidedly detached from the national-Community conflicts related to supranationalism and European integration. According to this vision the role of the Court could even be to prevent the normative evolution unless specifically agreed upon by the Member States. The entire jurisprudence of the Court of Justice represents a rejection of this approach, and, not surprisingly, it has come under acute criticism for this. Thus, in a critical even if sympathetic article, Hamson,^{41/} implicitly adopting the restrictive view based on Article 164, charged the Court in relation to the Van Gend en Loos case and its progeny of severing "... the legal world -- the world in which it operates -- from the world of what we called real or actual events", of "short-circuit-ing the scheme elaborated in the Treaty" and warned of the danger of the Court trespassing "... outside its province and attempting to establish by its own fiat

what the Treaty directs to be established by a very different process".^{42/}

Although it is clear that the Court has not remained aloof in interpreting the Treaty and has taken a decidedly integrationalist approach, even Hamson has been careful not to charge the Court of actually overstepping the limits of the powers conferred upon it by the Treaty. The first question that has to be answered nevertheless is whether the integrationalist approach adopted by the Court is juridically legitimate within the scheme of the Treaty.

The key to answering this question and to understanding the Court's own vision of its role -- which contrasts sharply with the narrow interpretation of Article 164 -- must be found in the Preamble and Part One of the Treaty dealing with the principles upon which the Community is founded. The Preamble and Articles 1-2-3 declare the main objectives of the founding fathers and delineate the specific tasks to be pursued, and means to be employed in attaining these objectives. Thus we find, as the first provision in the Preamble, the objective of laying down foundations for an ever closer union among the peoples of Europe, in Article 2 the task, inter alia, of establishing a Common Market and in Article 3 the elimination of custom duties. For our purposes

Article 4 is of importance. It provides that the tasks entrusted to the Community (namely the provisions indicated generally in the Preamble and outlined more specifically in Articles 2 and 3) shall be carried out by the Assembly (Parliament), the Council, the Commission and the Court, each institution acting within the limits of the powers conferred upon it by the Treaty. It is clear that the Court, within its powers and while faithful not only to the Treaty but also to the general fundamental guarantees of due process and justice has conceived its charge alongside the other institutions with forwarding the tasks entrusted to the Community. In Van Gend en Loos, the Court can be seen as taking its philosophy from Article 4 to which Article 164 is subordinate. Van Gend en Loos is a specific case which links the elements of uniting the peoples of Europe (Preamble), establishing a Common Market (Article 2) and eliminating custom duties (Article 3) in one maverick doctrine which simultaneously achieved all three effects. The entire pattern of decisions creating the normative framework represents a grand design to achieve the same effect.

It is probable however that whatever textual manipulation we may use to explain the Court's ethos, the true motivation lies in the Court's political self perception. The normative design does represent a qualita-

tive leap. Indeed in some pre-1963 analyses of the system the lack of supremacy and direct effect were perceived as natural.^{42a/} But without these principles it was unlikely that a Community which envisaged a wide and detailed substantive programmatic evolution could ever evoke or, more crucially, become effective. It is in this commitment to effectiveness that is probably at the root of the judicial revolution. This however does not preclude us from pointing out the implications of this perception according to which the Court "regards itself as the trustee of the hopes and aspirations, the purposes and the objectives of the founders of the Community...".^{43/}

The Court was able -- at least for a time -- to maintain the momentum of normative evolution because of the traditional insulation which separates courts from direct pressures from the other political actors. The very vision adopted by the Court -- a vision which, in the wide sense, gives it a measure of partisanship in the Community-Member State tensions -- has the possible effect of eroding the traditional insulation and diminishing the authority with which the Court may speak. This in turn may lead to a curtailment of the Court's power to preserve and even continue the process of normative evolution. This interrelationship between

the judicial process and the political process will
be discussed in the light of the analysis of decisional
supranationalism.

FOOTNOTES

1. Articles 14, 15 ESC. Interestingly, the Schuman Declaration merely states: "Par la mise en commun de productions de base et l'institution d'une Haute Autorité nouvelle, dont les décisions lieront la France, l'Allemagne ..." indicating decisions binding on states and not in states. The formal supranational leap was effected by the actual Treaty framers who gave the High Authority power to adopt measures directly effective in the legal order of the Member States. For analysis see Robertson, Legal Problems of European Integration 91 RDC 105 (1957).
2. Decisions binding on members may be taken by UN organs see, e.g., Charter of UN, ch. VII. For Commentary, see Y. Dinstein, International Law, vol. 5 pp. 53-57 (Schocken, Tel-Aviv, 1979).
3. Robertson, note 1 supra.
4. See note 1 Chapter 7, Religious law -- especially where given exclusive jurisdiction in, say,

family matters -- may be regarded as supra-national in this sense. The Catholic Church could therefore be regarded in old and modern times as being in this sense supranational.

5. The literature on the doctrine is immense. For a lucid up-to-date statement see, e.g., D. Wyatt and A. Dashwood, The Substantive Law of the EEC ch.3 (Sweet and Maxwell 1980); J. Usher, European Community Law and National Law (G. Allen & Unwin 1981) at 17-30. For earlier studies which foreshadowed and perhaps even influenced developments see, Waelbroeck in Miscellanea W.J. Ganshof Van Der Meersch, Tome Deuxième (Bruylant 1972) 573. Bebr (1970) 19 ICLQ 257.
6. Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] E.C.R. 1.
7. The main operative part of the judgment is so well known as to render citation almost superfluous. For the benefit of non-Europeans, the following are the key elements in the judgment:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to Governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.... This confirms that the States have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.... The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals

at 12. For the process of constitutionalization in general, see Stein, 75 AJIL 1 (1981).

8. In Case 127/73 Belgische Radio en Televisie v SABAM [1974] E.C.R. 51, the European Court held that Articles 85 and 86 EEC were capable of bestowing rights and duties on individuals inter se. It should be noted however that these Treaty articles themselves involved actions of individuals. Cf. case 13/61 Bosch v de Geus [1962] E.C.R. 45 in which this development is already anticipated. (See Wyatt and Dashwood, note 5 supra, at 29-30.) The doctrine was evolved further in a subsequent case which was concerned with the general principle embodied in Article 7 EEC (non-discrimination on grounds of nationality) and which, unlike SABAM, did not necessarily involve individuals. Even the Commission -- usually very integrationalist minded -- doubted whether this Treaty principle should be given "horizontal effect". The Court took the radical position and held that the Treaty could indeed bestow rights and duties on individuals inter se: Case 36/74 Walrave and Koch v Association Union Cycliste Internationale [1974] E.C.R. 1405. See also Case 43/75 Defrenne v Sabena [1976] E.C.R. 455.

9. It is not proposed to discuss here the well known distinction between direct applicability and direct effect. (See, e.g., Winter's seminal Direct Applicability and Direct Effect, Two Distinct and Different Concepts in Community Law, 9 C.M.L.Rev. 425 (1972) and Usher, supra, n.5, at 18, 26-30. The extension of direct effect to directives was remarkable. Whereas Regulations by virtue of Article 189 EEC are directly applicable and thus inevitably, if self executing, produce -- by analogy to the reasoning of the Court in relation to Treaty provisions -- automatic direct effect, directives are only binding as to the result but leave to the national authorities the choice of form and method. It may then have been thought that they could not produce direct effect. See Joseph Aim and Société SPAD v L'Administration des douanes [1972] C.M.L.R. 901. The Court of Justice, in a step-by-step approach, has applied the doctrine even though subject to possible different structural conditions —————> to directives as well. Cases signalling this evolution are: Case 9/70 Franz Grad v Finanzamt Traunstein [1970] E.C.R. 825 (direct effect of a time limit in a directive -- "vertical" effect); Case 41/74 Van Duyn v

Home Office /1974/ E.C.R. 1337 (direct effect of a substantive provision of a directive but one which elaborated a substantive right bestowed by the Treaty -- "vertical" effect); Case 51/76 Verbond van Nederlandse Ondernemingen v Inspector der Invoerrechten en Accijnzen /1977/ E.C.R. 113 (direct effect of a substantive provision of directive concerning an obligation not directly bestowed by the Treaty and against which a national implementing measure was reviewed -- "vertical" effect); Cf. Case 21/78 Delkvist /1978/ E.C.R. 2327 (Directive as source of judicial review).

On the possible extension of "horizontal" direct effect to directives see Easson, Can Directives Impose Obligations on Individuals 4 E.L.Rev. 67 (1979). But see now Case 148/78 Ratti /1979/

E.C.R. 1629 (Advocate General submissions) and Case Becker

see also Usher, The Direct Effect of Directives E.L.Rev. not yet reported.

268 (1979); see also Timmermans, Directives: Their Effect within the National Legal Systems 16 C.M.L.Rev. 533 (1979) in Ratti and more directly in Becker the Court has retreated somewhat from its wide doctrine and accepts direct effect of directives only as a shield against a non-implementing Member State.

10. Case 6/64 Costa v ENEL /1964/ E.C.R. 585. With the same reservations expressed in note 7 supra the following are the main operative elements in the judgment:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community, and more generally, the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws without jeopardizing the attainment of the objectives of the Treaty set out in article 5(2) and giving rise to the discrimination prohibited by article 7

at 593-594.

11. Another important instance of constitutional interpretation occurred in Case 38/69 Commission v Italian Republic [1970] E.C.R. 56 in relation to Community "secondary" legislation. The Italian Government argued that a certain internal Community measure (pursuant to Article 235 EEC and accelerating the realization of the Common Market) had a contract basis as between the Member States and constituted an international agreement to which even reservations could be made. The Court gave short shrift to the argument upholding the institutional rather than contractual nature of Community measures.

12. Here, of course, we have one of the most intractable problems of Community law. The Treaty of Rome is in many of its provisions fairly general lending itself to expansive teleological interpretation by the Court. This coupled with certain "elastic" clauses (e.g., Art. 235 EEC) gives a wide measure of latitude to the policy making organs to extend the boundaries of Community competence. Often this meets with national resistance. Cf. Close, Harmonization of Laws: Use or

Abuse of the Powers under the EEC Treaty? 3

E.L.Rev. 461 (1978),

13. Case 14/68 Walt Wilhelm and Others v Bundeskartellamt [1969] ECR 1. This is an ambiguous case.
See, e.g., Korah, (1981) 6 E.L.Rev. 14, 26 and n.50.
14. Case 106/77 Italian Finance Administration v Simmenthal [1978] E.C.R. 629.
15. Recital 3 of Judgment.
16. Recitals 7-9 of Judgment.
17. See, P. Barile (ed.) Il Primato del Diritto Comunitario e I Giudici Italiani (Franco Angeli, Milano, 1978).
18. The case involved, naturally, a combination of direct effect and supremacy issues. In relation

to supremacy the court stated in Recitals 17-23 that

In accordance with the principle of precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but -- in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States -- also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community Provisions.... Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provisions of national law which may conflict with it, whether prior or subsequent to the Community rule. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might

prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law. This would be the case in the event of a conflict between a provision of a Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary

(emphasis supplied).

The controversy is mainly with Italian doctrine. For an uncompromising but sophisticated statement of the Italian position, see Sorrentino, 'Lo Sviluppo della Forma di Governo Italiana nella Giurisprudenza della Corte in Materia Comunitaria', in Convegno sulla Corte Costituzionale e Sviluppo della Forma di Governo Italiana (Mimeo, Univ. degli Studi di Firenze, Facoltà di Giurisprudenza, 1981).

The Italian system whereby any question of conflict between Community law and national law becomes a constitutional issue, resolution of which must be left to the Constitutional Court itself (Case 205/76 of 4.8.76 [1976] 99 Il Foro Italiano [Foro It] 2299 may be criticized in terms of its own internal efficiency. It resembles

the sad story of the Mexican Amparo and the "degeneration" of an important constitutional mechanism in that legal order. See M. Cappelletti, Judicial Review in the Contemporary World (Bobbs-Merrill 1971) 20-21. Note, however, that according to Italian doctrine even if a national court were to declare the non-applicability of a Community norm -- this decision would not have erga omnes effect. Italian doctrine refuses to accept that in matters of Community law the European Court has a position similar to its Supreme Constitutional Court.

From the point of view of European law, the European Court's decision contains a possible ambiguity since, as seen, its ruling is applicable to a "... national court having jurisdiction to apply such law...". It could possibly be argued that in cases of conflict the lower national court, by virtue of the decision of the Italian Constitutional Court, has no such jurisdiction. Since the jurisdictional competence of courts is usually a matter for the national legal order, the Court of Justice could not interfere in this matter any more than if certain lower courts were denied jurisdiction over matters involving a large sum of money even if concerned with Community law.

19. See generally, Bebr (1974) 11 CMLRev 3 and R. Plender and J. Usher, Cases and Materials of the European Communities (Macmillan 1980) 173-220. In the Netherlands and Luxemburg, having a monist system which acknowledges the supremacy of treaty law, acceptance was not difficult. (See Articles 63 and 65, 66, 67 of the Dutch Constitution.) Application of the European Court's decision in, say, Van Gend en Loos was in fact non-problematic. As regards Luxemburg see Pescatore, Prééminence des traités sur la loi interne selon la jurisprudence Luxembourgeoise [1953] Journal des Tribunaux 455.

In Belgium, the situation was constitutionally ambiguous until the landmark decision of the Belgian Cour de Cassation in the Le Ski Case [1972] C.M.L.R. 373 in which the Belgian Supreme Court adopted the most full-blooded version of supremacy as required by the European Court.

Cf. Article 25 bis of Constitution (1970) and profound discussion by Louis in Mélanges Fernand Dehousse (Fernand Nathan/Editions Labor 1979) 235-242. The question of a Community provision coming into direct conflict with norms of the Belgian (and French) Constitution arose in a recent decision -- Case 149/79 Commission v Kingdom of Belgium decision of 17.12.80 (not yet

reported). The Court remitted the case back to the parties for further clarification before final resolution. The Belgian government in its pleading did not deny that Community rules override national rules but suggested that in interpreting the meaning of a term in the Treaty (in that case "public service") the Court should use an approximation of the Constitutional law of the Member States as an interpretative aid.

20. This was the case in Germany and Italy. For Italy see n.17 supra and "Italian Frontini" Case /1974/ 2 CMLR 386. For Germany see, German Handelsgesellschaft Case /1974/ 2 CMLR 551 (Decisions of 29.5.1974 BVerfG 37; 271). For a useful discussion on the implications of this case see H.G. Schermers, Judicial Protection in the European Communities (Kluwer, Deventer, 1979) pp. 92-97. Note that the German Federal Constitutional Court was concerned with constitutional safeguards as regards legislation; the supremacy challenge was only indirect. Otherwise, the German Federal Constitutional Court has fully accepted the supremacy of Community law even over subsequent national law -- see, German Lütticke

Case, Bundesverfassungsgericht decision of June 9, 1971 [1971] AWD, 418-420 (BVerfG 31; 145).

The German Federal Constitutional Court has rejected the possibility of Verfassungsbeschwerde (constitutional complaints) as against acts of the Community authorities limiting this type of recourse to action by German public authorities. See German Constitutional Rights case, Bundesverfassungsgericht decision of October 18, 1967 [1967] AWD 477 (BVerfG 22; 293); and note in 5 CMLRev 483 (1967-68).

21. However, unless the German Federal Constitutional Court modifies its own position (cf. now BVerfG decision of July 25, 1979, 15 Europarecht 68, (1980) 2 CMLR 531) the conflict cannot be fully resolved until the Community has a written bill of rights which corresponds to the guarantees of the German basic law. Another condition which the German Federal Constitutional Court imposed, which has been only partially fulfilled is the evidence of a democratically legitimated Parliament directly elected by general suffrage (which now exists) which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level. Whereas

the demand for a codified bill of rights may not be unreasonable the latter demand is fanciful and fails to appreciate the political nature and political potential of the Community. It is doubtful whether the Parliament will ever get full legislative powers. It can hope perhaps for co-decision powers. The Council of Ministers will not -- unless fundamental changes in the Treaty take place -- be subject to political control by the European Parliament.

22. See generally, Weiss [1979] 1 Legal Issues of European Integration [LIEI] 51. The French Cour de Cassation (Chambre Mixte) accepted the doctrine in the celebrated case Administration des Douanes v La Société "Cafés Jacques Vabre" S.A. (1975) 2 CMLR 336. The Court relied however on Article 55 of the French Constitution which gives Treaty provisions (subject to certain conditions, esp. reciprocity) a force higher than French statutes even those subsequently enacted. This reasoning does not amount then to full acceptance of the shift in the Grundnorm. It should be noted that Procureur Général Touffait had explicitly requested, in relation to Article 55 of the French

Constitution, that the Court should not "... mention it and instead base [its] reasoning on the very nature of the legal order instituted by the Rome Treaty". This the Court implicitly declined to do. In a subsequent case, however, Clave Bouhaten von Kempis v Geldolf (Husband and Wife) [1976] 2 CMLR 152 the 3rd civil chamber arguably "... did take the plunge ..." (March-Hunnings, Rival Constitutional Courts: A Comment on Case 106/77 15 CMLRev 483 at 484 (1978) and accepted the doctrine without reference to Article 55 of the French Constitution. The Criminal Chamber of the Cour de Cassation has also been Community minded -- see, Administration des Contributions Indirectes v Ramel [1971] CMLR 357; and Republic v Von Saldern et al. noted in 10 CMLRev 223 (1971). By contrast the Conseil d'Etat has, basing itself on somewhat antiquated notions of separation of powers, refused the acceptance of the supremacy principle as applied to parliamentary "loi". The doctrine would probably apply to governmental decrees (cf. Cohn-Bendit case, note 16, Introduction, supra). See Syndicat Général des Fabricants de Semoules [1970] CMLR 395. See also, Syndicat des importeurs de vêtements et produits artisanaux C.E. 28.5.1979,

and C.E. 22.10.79 /1980/ Actualité Juridique
Droit Administratif 95. On the ambiguous
position of the French Constitutional Court,
see Mitchell, What Happened to the Constitution
on 1st January 1973? 2 Cambrian L.Rev. 69
(1980) at 78-79 and notes therein. See also
Kovar & Simon, Some Reflections on the Decision
of the French Constitutional Council of December
30, 1976 14 CMLRev 525 (1977).

23. Ireland actually introduced a Constitutional amendment -- see Article 29, Third amendment to Irish Constitution of 1972. And see Temple-Lang, Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty 9 CMLRev 167 (1972). The Danish Constitution already had a provision of delegation of powers to international organizations (Article 20 of Danish Constitutions). But see, Due and Gulman Constitutional Implications of the Danish Accession to the European Communities 9 CMLRev 456 (1972) analyzing the debate as to the possibility of Danish compliance with the principle of supremacy especially vis-à-vis constitutional provisions (at 265-267). There have been very few references from Denmark to the European Court so that the matter is still judicially open. See

Rasmussen, Survey of Cases 4 ELRev 484 (1979).
For Greece see Everigenis (1980) 17 CMLRev 157.

24. See e.g., Wintertorn, The British Grundnorm: Parliamentary Supremacy Re-examined 92 LQR 591 (1976). But see Mitchell, note 22 supra.
25. In the most recent case -- indeed the first case in which the House itself made a reference under Article 177 -- R. v Henn & Darby [1980] 2 WLR 597 their Lordships did not raise directly the question of supremacy. They did however accept the duty to refer and by implication the binding authority of Community law as interpreted by the European Court. Note however that in any event this case was not concerned with British legislation subsequent to Community law. See, Faull, Moralité publique et libre circulation des produits 4 CDE 446 (1980); Weiler, Europornography, First Reference of the House of Lords to the ECJ, 44 MLR 91 (1981).
26. Lord Denning's judicial statements have so oscillated that they must now be taken with a measure

of caution. In Blackburn v A.G., [1971] 2 ALLER 1380 he said "We have all been brought up to believe that in legal theory, one Parliament cannot bind another and that no Act (such as the European Communities Act, Sections 2 and 3 of which sought to entrench the supremacy of Community law) is irreversible ... if Parliament should [try and revoke the Act], then I say we will consider that event when it happens" at 1382. It would seem thus that he was acknowledging that the sovereignty principle was a legal rule which could be changed by the Courts and that in the case of the Treaty of Rome that possibility of Grundnorm shift was not excluded. By contrast in Felixstowe Dock and Railway Co. v British Transport Docks Board [1976] 2 CMLR 655 he stated "It seems to me that once a Bill is passed by Parliament and becomes a statute, that will dispose of all this discussion about the Treaty. These courts will then have to abide by the Statute without regard to the Treaty at all" at 664. In two subsequent cases his statements became more subtle. Thus in Shields v E. Coomes (Holdings) Ltd. [1979] 1 ALLER 456 he made the following hypothesis:

"Suppose that the Parliament of the United

Kingdom were to pass a statute inconsistent with article 119 /dealing with equal pay for women/ by giving the right to equal pay only to unmarried women. I should have thought that a married woman could bring an action in the High Court to enforce the right to equal pay given to her by article 119... If /the courts/ should find any ambiguity in the statutes or any inconsistency with Community law, then /it/ should resolve it by giving the primacy to Community law"

at p.460. This may look like acceptance of supremacy but Denning was careful to choose a situation of inconsistency rather than conflict that is where the Community provision extended British law and did not directly conflict with it. But in Macarthys Ltd. v Smith /1979/ 3 ALLER 325, he stated that filling the gaps in this way was on the assumption

"... that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation. As I said in Blackburn v. Attorney-General: 'But if Parliament should do so, then I say we will consider the event when it happens.' Unless there is such an intentional and express

repudiation of the Treaty, it is our duty to give priority to the Treaty"

(at 329). With which Lawton LJ agreed,

The third judge (who subsequently retracted somewhat: cf. [1980] 3 WLR at 949) said "If the terms of the Treaty are adjudged Luxembourg to be inconsistent with the provisions of the Equal Pay Act 1970, European law will prevail over that municipal legislation." I.e., adopting a supremacy position although not in relation to subsequent legislation. This position does not change in the light of the final decision of the court of appeal once the reference from Luxembourg was received. Denning said then [1980] 3 WLR 947 at 949:

"... It is important now to declare -- and it must be made plain -- that the provisions of article 119 of the E.E.C. Treaty take priority over anything in our English statute on equal pay which is inconsistent with article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it"

and

"... Community law is part of our law by our own statute, the European Communities Act 1972. In applying it, we should regard it in the same

way as if we found an inconsistency between two English Acts of Parliament: and the court had to decide which had to be given priority."

Denning could be read to be saying that the 1972 European Communities Act is no more or less than any other Act and that supremacy in this case is simply a result of it being enacted after the 1970 Equal Pay Act which was at issue (although several provisions were reenacted in the 1975 Act).

A leading authority summarizes the situation thus:

- (1) While the European Communities Act 1972 remains in force, existing directly applicable or effective Community law will be the law in the United Kingdom, notwithstanding any legislation prior to the Act which is inconsistent with such directly applicable or effective law;
- (2) Community law which is not directly applicable or effective will have no force in the United Kingdom until given effect by Act of Parliament or by order or regulation enacted pursuant to powers given by the European Communities Act 1972 or other legislation;
- (3) Directly applicable or effective Community law will take effect in the United Kingdom, notwithstanding any legislation prior to the 1972 [European Communities] Act, or even after the Act but prior to the coming into effect of the Community rule;
- (4) A subsequent Act of Parliament which is inconsistent with a rule of Community law will be read subject to the rule of construction in s. 2(4)

so that Community law can take effect notwithstanding the Act, at any rate if the Court is satisfied that the subsequent inconsistent legislation is not intended, expressly or impliedly, to repeal s. 2(1) pr (4) of the 1972 [European Communities] Act; but

(5) Any subsequent Act of Parliament inconsistent with the European Communities Act 1972, including one which repeals the latter in whole or in part and one which is intended to limit the application of s. 2(1) and (4), will be given effect by the United Kingdom courts.

L. Collins, European Community Law in the U.K. (Butterworths, London, 1980) at pp. 25-26.

27. Note 6 supra at p.7 (emphasis supplied).

28. Id. at pp. 23-24.

29. I am most indebted here to a paper delivered by Professor M. Waelbroeck at a conference held in Bellagio, Italy in July 1979 entitled Community Preemption and Related Problems on which I have relied extensively in this part. See also D.J.

Gijlstra et al. (eds.) Leading Cases and Materials on the Law of the European Communities (Kluwer, Deventer, 1977 at 88-95) and Louis (1979) 2 Revue d'Integration Européenne 355.

30. Thereby indirectly prohibiting national legislation even if compatible in fields already occupied by a regulation. See e.g., Case 34/73 Variola [1973] ECR 990; Case 39/72 Commission v Italy [1973] ECR 113. See also Amministrazione delle Finanze dello Stato v Ditte Fratelli Grassi e Greco Rocco Michele [1976] I Giurisprudenza Costituzionale 1292.
31. Case 22/70 Commission v Council [1971] ECR 273.
32. Recitals 17-18 of Judgment p. 274.
33. Opinion 1/75 [1975] ECR 1335.
34. Id. at 1363. Note however that unlike ERTA where there were no Treaty provisions at all for external

competence in relation to transport, the OECD case fell within the commercial policy which has such provisions.

35. Joined cases 3, 4 and 6/76, Cornelis Kramer and Others /1976/ ECR 1279.

36. Id. Recitals 35-39 of Judgment, p. 1310.

37. Treaty of Accession, Article 102.

38. Opinion 1/78 /1979/ ECR 2871.

39. Recitals 57-60 of Judgment, pp. 2917-2918.

40. See note Gijlstra, n.29 supra.

41. Hanson, Methods of Interpretation -- A Critical Assessment of Results, in Judicial and Academic

Conference (Court of Justice of the European Communities, Luxembourg, 1976) II.

42. Id. at II 9; II 25 and II 26. Hamson's critique is not merely one of judicial policy and judicial role. In analyzing Van Gend en Loos he makes an acute distinction between categorical Treaty provisions which prescribe a particular consequence (e.g., Article 85(2)) and imperative provisions which only prescribe a legal obligation. He maintains that the doctrine of direct effect as expounded in Van Gend en Loos and its progeny renders -- unjustifiably and illegitimately -- all imperative provisions categorical.
- 42a. See, G.W. Keeton & G. Schwarzenberger (eds.) English Law and the Common Market (Stevens, London, 1963).
43. Hamson, note 41 supra, II 25.

Chapter Three

The Diminution of Decisional Supranationalism

Decisional supranationalism and its expression in the evolution of decision making in the Community are, by comparison to normative supranationalism, less easy to trace and analyse. Several reasons account for this difficulty. Strangely (or, perhaps, wisely), the Treaties are rather cryptic in their institutional provisions. A literal reading of texts gives little vision as to the function of the institutions and only a formal indication as to their competences and powers. Inevitably, there is an enormous gap between these formal provisions and the Realpolitik manifestation of power in Community life. We noted, in discussing normative supranationalism, the preeminent role played by the European Court of Justice in widening and deepening the scope and meaning of normative supranationalism. Apart from all other features in its operative part the judicial process is characterised by a high measure of transparency which facilitates the task of the Community observer. It was possible to identify with relative ease and precision the evolving

stages of normative supranationalism. By contrast the process of political decision making and policy formulation is much more obscure¹ and its evolution is marked less by clear cut landmarks--although some critical ones exist--and more by a subtle process of institutional interplay.² The tension between "whole and parts" is, naturally, a constant feature of this field as well. It manifests itself here in two, sometimes converging, axes: 1) Community versus Member States; and, within the Community, 2) non-intergovernmental versus more intergovernmental institutions. It would, naturally enough, be far too simplistic to suggest that decision making may be explained by simple reference to these axes. The formulation of Community policies is a complicated and multi-phased process and the duality of axes manifests itself at almost each stage.³ This will be illustrated below. At the same time, if a global view is adopted it is possible to detect a clear enough evolutionary line in decisional supranationalism, namely its decline. This decline is apparent in relation to all criteria which were used to characterise decisional supranationalism.

i) The independence and the autonomous policy
and decision making role of the intergov-

ernmental institutions is declining;

- ii) the weight of non-intergovernmental institutions in pluri-institutional decision making processes is declining;
- iii) within quasi-intergovernmental institutions there is a decline of their unique supranational features;
- iv) in the execution or detailed legislative implementation of Community policies there has been a shift to Member States domination.

To understand this decline we must first discuss briefly the political institutions themselves and then turn to the decision making process.

The main European Community institutions are sufficiently well known and do not need detailed description here. In the first three decades of Community life, apart from the Court, the institutions which dominated the scene were, clearly, the Commission (and High Authority) and the Council of Ministers. Also clear enough is the general role assigned to both organs. The Commission and its staff--although reflecting the national composition of the Community⁴--is undoubtedly the more communautaire and less intergovernmental of the two. The Commissioners

are required by the Treaty "in the performance of their duties neither to seek nor take instructions from any Government or from any other body Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks".⁵

The Commission as a body is thus notionally autonomous from the Member States and specifically free to pursue the Community interest. The functions of the Commission are varied. It has the exclusive role of initiating legislation (in the formal sense); according to this scheme it is also the central administrative organ of the Community;⁶ it has a potentially important "diplomatic" role in acting as broker between the Member States; it acts as "federal agency" in those spheres where the Community has assured fully fledged federal powers (e.g. competition policy); it supervises the execution of the Treaties and Community law by Member States and acts as a "supranational public attorney general" in case of violation. According to early theory of the Community it was to be the technocratic "functional" core which would engineer and pre-

cipitate the famous spillover leading the Community towards political union.

The Council of Ministers by contrast is the main formal legislator--clearly indicating the centrality of the Member States. It would be wrong, stricto sensu, to characterise the Council as an intergovernmental institution. Its rules of voting and procedure, the role of the President and the formal reliance on Commission draft legislation distinguish it from classical intergovernmental organs and characterise it as supranational as well--albeit in a limited way.⁷ Also, one important feature must be emphasised if the supranational character of the Council is to be fully appreciated. It is true that the Council can refuse to enact any legislation put before it by the Commission even if the policy is clearly in the interest of the Community. In rejecting such legislation, or amending it,⁸ the Council can be--and often is--motivated by interests which are contrary to the "Community spirit".⁹ The Member States are, however, obliged to act jointly, though not necessarily unanimously, within the framework of the Council of Ministers. This is one of the striking interactions of normative and decisional suprana-

tionalism. In any given field which is regulated by Community law and for which competence has been transferred to the Community organs, the individual Member States are precluded from taking unilateral action in implementing and/or changing the policy; they must act jointly as the Council of Ministers within the normal decision making procedures of the Community. I shall elaborate this point further below.

In theory, then, the tandem of Commission--charged with policy initiative, a secondary legislative function¹⁰ and with execution and supervision tasks--and Council--charged with policy decision making and actual "primary" legislation thereby representing directly the interests of the Member States--was meant to achieve the balance in the decision making process between Community and Member States. The real story has been very different, its main theme being the ever increasing strengthening in the weight of the Council and Member States and a corresponding decline of the Commission.¹¹ This process has manifested itself in several ways:

A. The decline of the Commission: the signs

In the early years of the Coal and Steel Community, the High Authority enjoyed a large measure of au-

tonomy. Its responsibilities were fairly narrow--confined to these two sectors--and its functions resembled the current Commission functions in, say, the field of competition. Its main addressees were sectoral undertakings and the governmental departments directly concerned. This relative narrowness explains perhaps its measure of autonomy. The effect of High Authority activity on the Member States was ex hypothesi rather limited. Politically it did not emerge as a serious focal point of real power. Moreover, normative supranationalism was as yet fairly embryonic. The High Authority was king in its Court.

With the conclusion of the Treaty of Rome the sphere of activities of the Communities received an enormous qualitative and quantitative boost. Despite the deliberate attempt to play down the supranational character of the Community, since 1958 Community decisions have had a much greater effect on national life: establishment of the Customs Union, the pursuit of the Communities' four "freedoms" (free movement of goods, labour, services and capital) and the creation of Community common policies inevitably and increasingly encroached on national policies, national legislative competences and national administrative free-

dom. One could expect an a priori greater interest and greater involvement of the Member States in the Community process. A further problem was bound to develop--the emergence of the Community "democracy deficit".¹² The democracy deficit has two tightly connected aspects. In the first place given the possible, often exaggerated, tensions between Community interests and national interests there was a fear that Community programmes would be developed which did not pay due respect to national interests. The European Assembly (Parliament) was denied by the Treaties any meaningful say in the evolution and supervision of policies and law. Its members were not directly elected to their posts but nominated by and from national parliaments. The Commission for its part lacked any direct popular legitimacy and the Council of Ministers--the main legislative body--represented the executives of the Member States. It was only to be expected that uneasiness about the Community legislative process would develop. In the absence of an effective democratically legitimate Community check on the legislator, it was inevitable that there would be a shift to national scrutiny. Alas, national parliaments have created largely unimpressive mechanisms for control of Community ac-

tions.¹³ Instead a powerful Council of Ministers which was, at least in theory, answerable to national parliamentary control could be seen as some answer to this aspect of the democratic deficit.¹⁴ This solution is largely illusory. Much of the Council work is done by the civil servant COREPER members who are no more "legitimate" than the Commission and with the possible exception of Denmark, there is little direct control, except on major issues, on ministerial work within the Council. Indeed--and this is the other aspect of the deficit, which remains unanswered to date--the national ministers may use the legislative forum of the Council so as to pass legislation which may have been checked and even vetoed in the national parliaments. The other traditional check on the legislature was of course to be the Court of Justice. In the early 60's, however, the Court saw as its main task the evolution and consolidation of European institutions and policies. Thus, for example, when a Community measure allegedly violating fundamental rights enshrined in a constitution of a Member State was brought before it for judicial review, the Court adopted a narrow formalistic approach and declared

in effect, that the Treaties did not impose a duty to

respect those rights.¹⁵ The Court was concerned not to impede in any way the function of the Community institutions nor to threaten the primacy of Community law. Later the Court learnt that the process of integration would be enhanced rather than impeded by a bold policy of judicial review¹⁶ but the Court's early attitude added thus to the democracy deficit.

Despite these two factors, the enormous increase in the range of Community activities and competences and the emergence of the democracy deficit--both of which would seem to suggest an inevitable increase in the importance of the Council of Ministers--the eclipse of the Commission was not immediately apparent. Two interrelated factors contributed to the maintenance of Commission power. First, the proximity in time to the conclusion of the Treaty of Rome bestowed legitimacy on the activities of the EEC in its first years. The Treaty and its provisions were debated in all six national parliaments and were approved. Secondly, so long as the Community was seen to be confined to an implementation of the explicit operative parts of the Treaty, the democratic deficit did not come to the fore. Given that the Commission's main task was the execution of these explicit

policies--principally the establishment of the Customs Union--it did not come into major policy conflicts with the Council. (There were in fact certain personality clashes, in itself indication of the political self-perception of the Commissioners and their President in the early years.)¹⁷

The Commission was thus able to gain immense prestige by the rapid and professional manner in which it coordinated the process of implementation and by its skill in fulfilling its "broker" role in securing the agreement of, and settling the disputes among, the governments of the Member States. Once these first tasks were substantially achieved, however, the process of erosion in the Commission's position began to become more transparent.

The signs of the Commission decline are clear enough and discussed ably elsewhere.¹⁸ Of the more important signs one should mention the rise to eminence of the Committee of Permanent Representatives (COREPER) as a powerful intermediary between the Commission and Council and the initial exclusion and subsequent toleration of the Commission in the new policy-shaping European body--the European Council.

The European Council was set up dehors the Treaties

and became the institutionalised forum for the meeting of Heads of State and Government. Its function was not only to shape new "second generation" policies but also to serve as the main arena for the settlement of intergovernmental disputes regarding Community issues. The rise of COREPER meant that Commission initiatives were subject to intergovernmental influence at an extremely early stage in their formulation thereby detracting from the Commission role as representing the Community vision.¹⁹ This process of national intervention occurs not only after a Commission proposal is made and before it is submitted formally to Council. "Legislative Committees" comprising representatives of the Member States and Commission officials already scrutinise embryonic proposals closely after their conception within the Commission services and directorates-general. A proposal might be aborted because of national disagreement even before it is put on the Commission agenda. The emergence of the European Council contributed to the detraction from the Commission's role as a source of fresh Community ideas and as the broker between the Member States.²⁰ The Commission was hemmed in by two new bodies "usurping" both its technical and political-

cal-diplomatic functions.

B. The Council of Ministers--Erosion of supra-
national features: the signs

The erosion of decisional supranationalism has not only been apparent in the decline of the Commission vis-à-vis the Council (in both its derivatives: European Council and Council of Ministers). Within the Council of Ministers itself there has been a decline in its supranational characteristics. We have already noted the emergence of the European Council. This, it is submitted, is an indication of the failure of the Council of Ministers' "First Eleven"--the Foreign Ministers--to assert themselves as an institutional body capable of giving direction to the Community and solving its problems. The need to resort to old style loosely structured summitry is a clear regression in the role of the Council of Ministers qua Community body.

The second, perhaps more, important landmark in the decline of decisional supranationalism was the retreat by the Council of Ministers from majority voting--which had been designed as the clearest manifestation in the decision making process of the pre-eminence of the Community interest over the national interest--to consensus decision making. This move,

precipitated by France and at first grudgingly accepted by the other five in the legally dubious Accord of Luxembourg,²¹ was to become, with the accession of the three new Member States, an accepted Community norm. Thus, one of the truly outstanding supranational features of the Council's procedure was reduced. Majority voting itself is not entirely exceptional in international organisations. It is the law making power of the Council and the effect of that law on and in the national legal orders as expressed in the concept of normative supranationalism which made the prospect of majority voting so unique. The existing veto power which each Member State now holds does not necessarily paralyse the Council because, as we have seen, in areas controlled by the Community the Council must at the end of the day take a decision if entire policies are not to come to a halt. The power to veto does not give an individual Member State the power to impose its own desire as to the eventual outcome of the decision making process. Rather the effect had been to force the nine partners into "package-deal decision making" with compromises being sought not only as regards each policy but among various policies. This development was no doubt instrumental in the emergence of the European Council as a forum for this high power-

ered political horse-trading although, as submitted above, the Council of Foreign Ministers could have assumed this function.

The Luxembourg Accord and the power of veto did not completely destroy Community superiority in decision making. First, there is the simple fact that, albeit by consent of the Council, many issues, noticeably the budget, are still decided by majority voting.²² Secondly, the veto power of the Member States in itself does not necessarily entail, as most commentators assume, the blocking of the Community supranational process. What is crucial is the legislative context in which the veto is exercised. When the Treaty provides explicitly for Council unanimity in adopting certain policies,²³ the veto power thereby entailed gives the individual Member State the ability to block directly any unacceptable measure. And to the extent that the Luxembourg Accord extends this power to measures in which the Treaty provides for majority or qualified majority voting, the same ability will naturally exist.

However, Article 149 EEC provides that when acting on a proposal from the Commission "unanimity shall be required for a /Council/ act constituting an amend-

ment to that proposal". In this case, then, the veto power available to the individual Member State gives it the power to prevent any tampering with a Commission proposal--i.e. a "supranational veto"--but not the ability to force an amendment. The only way open to a recalcitrant Member State whose proposed amendments are "supranationally blocked" by the veto of another state insisting on the Commission original proposal, is to veto the entire measure which of course is a much more serious matter and demands a higher threshold of national interest. Indeed Parliament made astute use of this principle in its latest budgetary wrangle with the Council. The regime of "deadlines" in the budgetary process which prevent indefinite delays and the ability of three Member States to block by a "qualified veto"²⁴ the changes which the Council wished to introduce to the 1980 Parliamentary supplementary budget led to adoption of that budget by the President of Parliament.

The strict doctrine of separation of powers according to which the executive is concerned solely with implementation of policies adopted elsewhere was probably never tenable and the crucial policy making role of executives is so apparent as to obviate any

in the Community system is not easy. We have already noted that one traditional function of executives in contemporary Western democracies, that of initiating and submitting policy proposals to the legislative branch--a task initially associated with the Commission--has, except in the narrow technical sense, been taken over to a large extent, by the Council of Ministers and the European Council.

Has there been a similar decline in the post-legislative phase? The issues here are complex and our conclusions must be regarded as rather tentative and speculative. In some limited fields, such as competition, the Commission acts like a federal agency with full executive powers although even here it has to rely for enforcement measures on the national systems. In most matters, however, the practical execution of Community policies and rules, be they in the field of agriculture, the application of the Common Customs Tariff, is performed by the national administrations acting as "agents" for the Community in such things as collecting charges, issuing clearances and dispensing grants. To the extent that the "agency" is automatic, acting directly on Community measures and Commission instructions, this feature cannot

be viewed as a weakness in the executive role of the Commission and as a sign of decline in decisional supranationalism.

However, the Communities as a political system have not escaped the world-wide trend of increased government by administrative legislation and action. Thus, whereas the legislature (the Council) enacts enabling measures or issues policy mandates, it is left to the "executive" to implement the policies by series of secondary legislative measures and administrative acts. Just as the COREPER was introduced by the 1965 Merger Treaty as an extra tier of Member State representation designed ostensibly to facilitate the technical preparation of Council meetings but in practice precipitating an erosion in the policy initiatory role of the Commission, it is possible to identify a similar trend in the establishment of Member State Committees in relation to the executive functions of the Commission. I shall focus, by way of illustration, on two aspects of this development: first, by way of micro-analysis on the role of one Committee already provided for in the Treaty of Rome, and, secondly, by way of overview on the general proliferation of Committees set up by Council secondary

i. The "Article 113 Committee"

Article 113 EEC dealing, inter alia, with conclusion of trade agreements by the Community bestows responsibility on the Commission for negotiating agreements although acting on a mandate given by the Council. The Commission must consult with ". . . a special committee appointed by the Council to assist the Commission in this task . . .". This "113 Committee" was duly set up,²⁵ composed of representatives of the Member States; its presidency held in rotation by the Member States holding the presidency of the Council. Its mode of operation is a useful illustration of the diminishing executive role of the Commission.²⁶ On the one hand a Council-Member State Committee would be useful especially if amendments to the mandate were needed and could be provided at the locus of negotiations. The Committee would also ensure that agreements negotiated would receive the ultimate assent of the Council upon which the constitutional power to conclude the agreement is bestowed. At the same time it has been pointed out that the role assigned to the Committee (and to national observers in other types of Community agreements) has meant that ". . . the Member

States are able to oversee the Commission's behaviour in every negotiating session and insure that its application of the mandates to concrete issues comports with their wishes"²⁷ and that thus the ". . . picture of the Commission . . . is that of Community spokesman and agent or, more technically, plenipotentiary of the Council. The term 'negotiate' has clearly not been interpreted by virtue of the role assumed by the Member States and the Council to accord the Commission an authoritative role in forming EEC negotiating policies or directing the negotiations themselves."²⁸ To the extent that the Commission has managed to re-build its role it has not relied on a re-interpretation of the Treaty provisions but on the sheer technical expertise which it can bring to the treaty making process. But in this sense it is no more than an equivalent to a competent national civil service.

It is perhaps worth pointing out that use of a "democracy deficit" argument to justify these developments is hardly convincing for, except in the most formal sense, curtailment of Commission power has reduced the role of one set of (European) civil servants and elevated another (national) set. The con-

tinued reluctance of the Council to increase the role of the European Parliament in the process of treaty making²⁹ testifies to the fact that national interests play a greater role than does concern for democracy.

ii. The proliferation of Committees

With the substantive expansion of Community activities, especially in the agricultural sector, a wide ranging network of Committees has been set up, many of them to partake in the "legislative implementation" of Community policies. Some of these are advisory committees the consultation of which is obligatory but the opinion of which once consulted is not binding.³⁰ Others, the Management and Regulatory Committees, have a more decisive role.

As regards the Management Committees, particularly prominent in the agricultural and fishery fields, the Commission must submit its draft measures to them. The Committee may approve the measure--by a qualified majority--or fail to reach a decision (if no qualified majority is reached either way) whereupon the Commission is free to adopt the measure which will have full legislative force. If the Committee

agreement against) the Commission may still adopt the measure but this measure will come into effect only after a certain period in which time the full Council may--by qualified majority--reject it. The Regulatory Committees procedure is slightly more restrictive on the Commission.³¹

It is difficult to assess this proliferation of Committees in relation to the power of the Commission. Unlike, say, the "113 Committee", the Commission presides in all these Management and Regulatory Committees. And since executive power is exercised here through legislative means the involvement of the Council would seem to be natural. Pragmatically, the involvement of representatives of the Member States may also contribute to smooth functioning of whatever policy is executed regardless of the implications to the institutional balance. Besides, in the decision making process the qualified majority rule means that --as regards Management Committees--the vetoing power of a few States may actually assist the Commission in adopting the measure. All these elements would tend to point to the conclusion that the proliferation of Committees serves the ends of open and efficient government³² and as regards formal decision making in-

At the same time--taking a longer term view--one cannot avoid noting that these mechanisms indicate an unwillingness of the Council and Member States to entrust the execution of policy to the Commission with, say, safeguards of reporting and information. In this sense, then, the proliferation of Committees may be regarded as one element in the decline of decisional supranationalism.³³

c. The reasons for decline

It now remains to try to give some reasons for this erosion in the position of the Commission and the general decline of decisional supranationalism. Several such reasons may be given.

- i. We noted the early success of the Commission in implementing the explicit policies in the Treaties. The need to evolve a "second generation" of Community policies based on broad indications in the Treaties but not explicitly set out imposed a much more delicate and politically sensitive task on the Commission. The power of "initiative" now called for was less formal and technical, that is it no longer called for proposals which gave legislative form to explicit

Treaty obligations but rather it called for wide,

reflective and more "value" prone proposals.

Whereas the first generation of policies were negative--in the sense that the Member States undertook to refrain from certain actions and the Commission was charged with implementing this negative regime --the new policies were to have an actual positive content on which agreement was more difficult. The ability of the Commission to propose new initiatives and get them accepted was thus considerably weakened. The importance of the Council of Ministers and European Council was strengthened. It was those bodies which could give the drive to new policies. To be sure, the Commission retained its position as a source of ideas and vision for developments on the Community level. The environmental policy, to give but one example, would not have emerged without an internal Commission initiative. But it was for the European Council to sanction the policy, to balance it and officially to launch it. The Commission was left somewhat in the background.

The need for "second generation" policies brought the democracy deficit to the fore. What is more, with the widening of Community activities, national parliaments felt threatened by a process

which would wrest even more power from them. The Commission which had little formal democratic legitimacy became an easy target for attack.

iii. The Commission itself, although growing in experience, put on much bureaucratic fat. This expressed itself not only in its numerical staff growth but also in the evolution of traditional bureaucratic ailments which significantly reduced its internal efficiency.³⁴ Lack of internal (lateral) coordination, distortions in the pattern of promotion, and personal and national rivalries all contributed to an internal drop in morale and an external drop in esteem. The materially privileged position of Commission employees (alongside all other Community employees) in the current harsh climate may also have contributed to this process.

iv. The independence of the Commission and its judicial impartiality began breaking down in a bizarre dialectical process. The very importance of the Commission prompted the Member States to take not only--as was constitutionally permissible--an active interest in the appointment of the Commissioners themselves but also in the promo-

tion of personnel within the Commission and in the allocation of portfolios among Commissioners. The Commission was thus seen to be losing its impartiality, a singular handicap when considering its intended mediatory role in Council disagreements. Internally, this governmental intervention contributed both to a strain on the collegiate nature of the Commission and the authority of its President.³⁵

Finally, it may be that the process of approfondissement of normative supranationalism, as described above, had a negative effect, at least as a contributing factor, on decisional supranationalism both in the Council-Commission relationship and within the Council itself. Normative supranationalism meant that the impact of Community policies and law was perceived as growing not only in scope --to cover more fields--but also in depth--so as to have a more immediate and binding legal effect from which the Member States could not escape. Thus, to give one example, the politically delicate issue of supremacy was countered by an insistence of the Member States on their control of the making of this "supreme" law and their ability to block its

making. This view of the role and power of national governments was emphasised strongly by "pro-marketeters" in the 1975 U.K. Referendum, using it (somewhat misleadingly) as a tool against charges of the "loss of sovereignty" which Community membership entailed. It is thus suggested that the correlation between the approfondissement of normative supranationalism and the diminution of decisional supranationalism is not accidental but at least partially causal. As we noted, the European Court of Justice had not excluded the sensitive field of foreign economic relations from the effects of normative supranationalism--giving one of its decisive rulings--the ERTA decision--on the doctrine of preemption in relation to the treaty making capacity of the Community. The Council of Ministers and the Member States, for their part, have ensured that in the execution of the Community's external policy the Commission is kept--by devices such as the 113 Committee--on a very tight rein and that the Member States, by a legal interpretation of the limits of Community competence, are active parties in many Agreements.³⁶

D. The decline of decisional supranationalism:
an interim assessment

Evaluation of the changes in the decision making process is rendered difficult not only because of the diversity of criteria which may be employed but also since in relation to each criterion the facts do not lend themselves to straightforward negative or positive conclusions. Rather it will be seen that the final balance sheet is mixed; one in which the "good" and the "bad" are intertwined. In this evaluation I propose to make reference to criteria of efficiency, democracy and supranationality.

Efficiency

In terms of efficiency it is clear from our analysis that the system has become burdened with additional layers--especially the COREPER and its auxiliaries--and that these layers coupled with the bureaucratic impediments in the Commission identified in, say, the Spirenborg Report, have contributed to the emergence of the so-called lourdeur of the process. Whereas undoubtedly the speed of decision making in the Community has slowed and the need for national consensus is taking its toll, one may still give a positive interpretation to these facts.

First, one should not forget the essential technical role which the COREPER fulfils. Indeed it is inconceivable that the Council in its pre-Merger days could have operated at any level of efficiency without the screening activities of the COREPER. The sheer volume of Community legislative activity would have defeated such a purely political organ as the Council. COREPER on this reading has become indispensable and it is safe to suggest that without the COREPER far fewer Community acts would get through. It is also clear that the Commission simply does not and cannot manifest all the technical and political expertise which is necessary to draft professional legislation in highly technical economic and social spheres with the added imperative that such legislation should fit without too many obstacles into 10 fairly diverse national systems. Despite all talk of increased bureaucratisation the entire Commission retains fewer professional administrators than most government departments in any of the medium sized and larger Member States. COREPER and the working groups provide this essential professional function.

The issue of consensus decision making is equally open to a dual interpretation in relation to the criterion of efficiency. To be sure the need for consensus and the ability of a Member State to veto has contributed much to the transformation of the Community decision making process from a legislative one to a diplomatic one. It has also enabled recalcitrant Member States to impede the process or delay it indefinitely. At the same time when one remembers that the Community has not got its own executive branch and that it depends on national authorities--and principally the national bureaucracies--for the faithful implementation, application and enforcement of Community law and policies, the silver lining of the cloud of consensus decision making begins to emerge. Even if majority voting were to exist, it is easy to imagine that there would be little the Community could do in the face of a reluctant, recalcitrant or even defiant national administration, in whose hands the actual implementation and application of Community law and policy lay.

The great potential advantage of consensus decision making in a system in which one bureaucracy is notionally responsible for legislation and another

for its execution is the increase in the probability of "acceptability" of, and receptivity to, the eventual outcome of the Community process. The ability of each national administration to block genuinely harmful measures and generally to iron out technical and political difficulties of Commission proposals increases the likelihood of subsequent faithful implementation. The psycho-political commitment which is created by national participation in the decision making process in Brussels may, on this reading, bear some fruit in the subsequent receptivity in Paris, London and the other capitals.

Democracy and representativity

The Community system departs in two fundamental ways from its national counterparts: parliamentary accountability is not integral to its decision making process, and its legislative capacity is not formally limited by a higher law of human rights. The evolution of normative supranationalism has rendered the problem more acute since it has increased the legal impact of this unaccountable and theoretically uncontrollable law. Whereas the question of human rights has been at least partially solved by the European Court of Justice (I shall return to

this theme in chapter ~~seven~~ below), the question of parliamentary accountability remains acute. It would thus appear that, at least in accordance with current political values, the system lacks the essential characteristics of formal legitimacy .

The argument that in the formal sense the problem does not arise since the mechanisms of the legal order derive from the Treaties (as amended) which were ratified by the people through national parliaments, loses much of its force precisely because of the process of approfondissement. Supremacy, direct effect and all the rest were not spelt out in the Treaties. They represent fundamental innovations which, as mentioned above, render the legitimacy problem acute.

But legitimacy is not merely a question of legal validity and formal accountability. It is also a question of social acceptability. Certainly these elements of accountability may constitute conditions which play a part in contributing to social acceptability and the lack of which may hinder such acceptability. Legal validity and formal accountability manifest other influences that may be equally important. I do not wish to enter into a theoretical dis-

cussion of legitimacy nor do I propose to enter into a sociological-psychological account of those elements in the Community which may or may not contribute to acceptability. It is however clear that the loyalty to the technical organs predicted by the early functionalists has failed to materialise. Indeed the bureaucratic nature of the Community--which is the antithesis to any Weberian notion of charisma--can only be a hindrance to the sociological dimension of legitimacy.

What then of the substance of Community activity? Certainly analysis of this dimension--concerned with the actual content of law--is rendered difficult in the absence of discussion of Community policies. But then we also know that material legitimacy is dependent as much on the process by which law and regulation are adopted as on the actual content of such law. It is clear that the deficiencies in accountable and responsive processes reduce the feasibility of material legitimacy. Whereas the possible impact of a lack of parliamentary control is fairly evident there is another dimension to the current Community decisional process which might also impede material legitimacy. The decisional process in the Member

States does not take place entirely within parliaments. Whether we adopt a model of representative democracy or a neo-corporatist model it is clear that often enough the normative content of national policy is the outcome of a process in which parties, employers, trade unions and other pressure groups interact --to influence the levers of power be they within parliament, the administration and at times even the judiciary--or to determine the outcomes themselves. In this game the government and the administration may be only two elements among many forces. These national pressure groups often represent delicate societal balances the preservation of which may at times be seen as contributing to national legitimacy and even stability.

The Community system as it has developed disrupts this balancing process in several ways.

In the first place because of the diplomatic Community game most issues have now to be reduced into the form of a "national position" or a "state interest". A government has to take a position. In many fields this is an artificial category and one which on the national scene is often avoided. Secondly, the executive and the administration will on

the transnational level have a freedom which at least in some fields they might not enjoy back home. Finally the balancing achieved at the national level between various interests and interest groups may be disrupted with dangerous implications for the subsequent acceptability of the policy output. Thus, for example, certain pressure groups, say, the motor industry, may find it much easier because of its relative concentration and ample resources to transfer impact to the European level. Their ability to regroup at the transnational level and ~~to~~ effectively ~~to~~ monitor and influence the decisional process may be far superior to that of, say, consumer groups. The latter are characterised by the diffuseness of the interests they represent, and by notorious organisational and financial difficulties that are all magnified on the European level. Once the focus of decision making--as regards, say, safety measures for automobiles--is transferred to the Community as part of the harmonisation of obstacles to trade, one can see how the balance of national decision making may be disrupted. Whereas the motor car industry may even profit from the concentration of decision making, consumer groups might find themselves in an invidious

situation. First they will have to organise transnationally--a much more formidable task considering the number of consumer groups not to mention the diffuse nature of their interests. Secondly, whereas in the national arena consumers, because of their electoral power may succeed in counterbalancing producer power by parliamentary impact, on the European level they are denied this classical lever. Thus if there is any truth to the charge that the automobile directives were "written by the industry" we have both a practical explanation to the phenomenon itself and also an illustration as to why the Community decisional process might contribute to material illegitimacy. As I suggested however at the outset the evolution of changes in the decisional process is one in which light and shade intermix.

It is possible to argue that even here the changes in Community decision making have created elements which alleviate the issue of formal legitimacy. From this formal point of view the shift to consensus decision making may, at least theoretically mitigate the issue of accountability. Whereas under a majority voting system a minister could always argue before his national parliament that a decision at

the Community level was taken despite his opposition, the availability of a Member State veto limits this possibility. Thus the potential for indirect accountability increases although in practice it is difficult for national parliaments to exercise effective supervision over their own executive at the Community level. At the level of social acceptability and material content the argument is more subtle and tentative. It is clearly the case that in as much as contentious Community policy is perceived--wrongly or rightly--as revolving around a conflict between the national interest and the Community interest, a dominance of national policy makers especially at the highest level of, say, the European Council, will be reassuring in national circles and render Community outcome more palatable. Indeed I would submit that governments often deliberately construe the decisional process in this way so as to enhance the dominance they have assumed and to legitimate themselves qua executives in fields where they might be much more curtailed at the national level. There is always a tendency to accept governmental action as regards issues--particularly in the external arena--where an alleged national interest is at stake. Finally and most tentatively of all, the general dominance of the

Member State in the Community fora may help "lend" whatever legitimacy governments have "at home" to the overall Community process. The game may be seen less as "them" and "us" since them becomes us. This transposition is not however complete. Indeed often governments will use the Community as a convenient "whipping boy" for their internal problems.

Supranationality

It is clear from our earlier analysis that the changes in the decisional process have diminished the supranational character of the Community. It is however important to indicate with precision the elements which determine the reduced supranationality.

Certainly the emergence of consensus decision making is the single most important element in this decline. We have however to be cautious in evaluating the significance of this development. In the first place it should be remembered that the Luxembourg Crisis and subsequent Accord which instituted the Member State veto power took place before the completion of the transitional period. It was only after that period that majority voting was to come into force. In the strict sense the Accord did not destroy an existing practice but prevented it from

developing. Further, even after majority voting was to come in, the Treaty itself provided for unanimity in most crucial areas of Community policy making. In the narrow sense the significance of "Luxemburg" was restricted to those operational areas of the Treaty programme where unanimity was not required. I would however suggest that the Accord did have a significance which went far beyond the potential disruption of those operational areas: it symbolised a transformation from a spirit of 'Community' to a more selfish and pragmatic 'cost benefit' attitude by the Member States. It was a change in ethos at first resented and rejected by the five but later--especially after the first enlargement--eagerly seized upon by all. In this sense the damage to the supranational nature of the Community was very substantial.

In the second place it is important to realise that consensus decision making is not a homogeneous practice. Not only, as we have seen above, is majority voting still practiced in, say, the various Committees set up to "assist" the Commission in the implementation of Community policy. But also in the decision making process itself we can distinguish

between several situations in which the specific constellations of law and fact create different categories of consensus making. The differentiation of these categories depends on the existence of incentives to consensus. These might exist either as a matter of law enshrined in the doctrine of preemption, as a matter of fact where "factual preemption" may exist or as a result of *contingent* political and diplomatic factors.

Category a: no legal preemption and minimal or no
factual preemption

In a field such as consumer protection the Community competence derives essentially from the voluntary agreement of the Member States ex Article 100 and 235.³⁷ There is no positive obligation to operate in the field and crucially, in the event of failure to adopt rules the Member States are free to pursue national policies. No legal preemption exists. Also the level of market integration in the Community has not reached the stage where the "regulatory gap" factor, evidenced in, say, the USA³⁸ provides a strong economic-political incentive to create factual preemption: namely a situation wherein the national policy option is not a factually viable alternative

in the absence of agreement at the Community level.

As a result the leeway given to each state is great and the pressure to arrive at Community consensus is low. The potential for delaying technics^{and} insistence on national priorities is high and above all the penalty be it in law or in fact for failure to arrive at a decision is largely absent.

The process within this category is indeed very close to an international diplomatic treaty making conference.

Category b: consensus decision making in the context of legal and factual preemption

To illustrate this category we may utilise the area of the annual farm price fixing within the Common Agricultural Policy. We can hardly imagine a more controversial and nationalistic area of Community policy. In recent times this annual event has become almost an institutionalised crisis. There is all the potential for lack of consensus. And yet there is the crucial preemptory factor: whereas the Member States might fail to reach agreement they are not permitted, legally, to adopt in the absence of a Community decision unilateral national measures. To

be sure, in extremis, there have been threats by some of the Member States to break the preemptory obligation. On one or two occasions slight breaches were introduced, but the political damage to the entire structure of the Community is such that the legal preemption has held firm. As a result, each year we observe a quasi-ritual. Lengthy negotiations, marathon meetings, delays and threats. But consensus invariably emerges despite the power of veto.

Between these two categories we may of course find many variables of the same theme. The budget procedure is an interesting example. Here the Member States, once again in a contentious area, have no complete freedom to disagree. The European Parliament may step in under certain circumstances, and a total budget failure will be damaging to virtually all Member States. As a result, the governments have agreed that in the budget procedure they will follow majority voting.

Category c: contingent political and diplomatic factors

Even in the absence of preemptory rules or factual preemption it is possible to reach consensus.

Either through genuine agreement on the utility of

measures or through bargaining and traditional diplomatic efforts. It should not be forgotten that during the mid 70s, a period in which the supranational decline was well established the Community adopted over 600 directives and several important regulations (besides the thousands of measures adopted on a daily basis criterion, the framework of the CAP, the CCP and other policies). It also reached international agreements, often substantial, within dozens of countries in a decisional framework the unanimity requirements of which were even more severe (because of the "mixed agreement" technique).

As the discussion above has revealed, the contribution of unanimity and consensus decision making to the decline of supranationalism is 'qualified' by a host of tempering factors. What then is the essence of the process of diminution? I have already indicated the change of ethos which veto power illustrated and reinforced. But beyond that I would suggest that the most important overall indicator has been the pervasiveness of the national interest at all stages of the decisional process. If we combine all the elements in our earlier analysis we will observe that the emergence of the European Council, the prominence of

working groups and COREPER, majority voting, and the proliferation of Committees mean that at each and every stage of the process, the Member States jointly and severally, have a controlling position. From political initiative (European Council) through technical elaboration (working groups, COREPER) through final adoption (veto power) through subsequent elaboration and execution (Committees) is the presence of Governments felt. Associated with this are the inevitable diplomatic techniques associated with such representation--secrecy (so as not to undermine delicately achieved compromises), national pride and all the rest. The overall interest in perpetuating a 'spirit' of Community has diminished, the tendency towards the lowest common denominator holding the Community together has increased. The Community ^{decision making} is less supra-national.

Notes

1. This is not to imply the Court's role is a-political. In fact the Court has shown a high degree of political acumen in, say, changing course on the question of human rights. It has also played an important role in demarcating the division of competences between different European Community Institutions. See, e.g., Case 22/70 Commission v. Council /1971/ E.C.R. 263 and joined cases 138/79; 139/79 Roquette v. Council, Maizena v. Council /1980/ E.C.R. 3333; 3393

2. This interplay is well illustrated in C. Sasse, E. Pouillet, D. Coombes, G. Deprez, Decision Making in the European Communities (N.Y. - London, Prager Publishers Inc., 1977) and H. Wallace, W. Wallace, C. Webb (eds.), Policy Making in the European Community (John Wiley, London, 1976).

3. See Wallace et al., id. supra, esp. Webb, Introduction: Variations on a Theoretical Theme, 1-31; and H. Wallace, National Bulls in the Community China Shop: The Role of National Governments in Community Policy Making, 33-68.

4. This inevitable feature of Community life is not only a sharp reminder that it is still a Europe of Nations but also places quality restraints on the body. "The need to cater for the differing interests of the Member States and to accept national quotas, however unofficial, . . . inhibits the development of an elite corps of policy-makers . . .". H. Wallace, id., at 53.

5. Article 10, Merger Treaty.

6. It should be noted that apart from a few limited fields such as competition, the actual practical execution of many Community policies is in the hands of the Member States acting as agents for the Community.

7. See P. Pescatore, The Law of Integration (Sijthoff, Leiden, 1974).

8. See Article 149, EEC.

9. There is here an apparent paradox. To the extent that, say, the governments of all ten Member States agree on a "desired" course of action, how

can this be said to be contrary to the Community spirit? For do not the governments represent the Member States which together are the Community? True as this may be, the originating Treaties still remain the main normative basis for Community evolution. To the extent that the governments consider disregarding the Treaty objectives (without formally amending it) they may legitimately be characterised as acting contrary to the Community spirit.

10. There is a certain terminological confusion regarding "secondary" legislation. Regulations and Directives are often referred to as secondary legislation. The better view, it is submitted, is to regard them as primary legislation. For if we view the Treaty as being the Constitution of the European Communities, the legislation thereunder, by analogy to national systems, would be primary. Perhaps the power of legislation entrusted to the Commission under enabling measures of the Council may be characterised as "secondary". See also Jacobs, Florence project.

11. A recent study giving a realistic appreciation of the institutional balance is S. Henig, Power and Decision in Europe (Europotentials Press, London, 1980); see also Sasse, note 2 supra.
12. Term borrowed from D. Marguand, Parliament for Europe (Jonathan Lape, London, 1979).
13. The following remarks by a leading commentator are instructive in this context. ". . . /A/11 Member States have organised their policy-making in such a way as to promote their own national interests These efforts to keep the formation and implementation of Community rules under national control are sustained by the fact that the organs of the European Communities still lack a democratic legitimation of their own To date, the control of European policy through national parliaments is at any rate comparably weak and is at most exerted via a detour that is through the control of governments." Sasse, The Control of the National Parliaments of the Nine over European Affairs in A. Cassese (ed.), Parliamentary Control over Foreign Policy

(Sijthoff & Noordhoff, Alphen aan den Rijn, Germany, 1980) at 147.

14. In fact a different type of democracy deficit emerged whereby the executive branch of the governments of the Member States were able to pursue policies which, perhaps, would be more open to challenge if conducted "at home". See Rogers & Bolton, The True Cost of Sanctions, The New Statesman 9.1.81.
15. Cf. Case 1/58 Friedrich Stork & Co. v. High Authority of the European Coal and Steel Community /1959/ E.C.R. 17.
16. See Cappelletti, The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis, LIEI 1 (1979). On recent developments of human rights and the Community legal order see Economides and Weiler, Accession of the Communities to the European Convention on Human Rights: Commission Memorandum 42 M.L.R. 683 (1979). See also, case 44/79 Liselotte Hauer v. Land Rheinland-Pfalz /1979/ ECR 3727, and Drzemczewski (1981) 30 ICLQ 118, 128-134.

17. See H. Wallace, note 3 supra, at 53.
18. See, e.g., Report on European Institutions pre-
sented by the Committee of Three to the European
Council (Council of the European Communities,
Luxemburg, 1980) hereinafter Three Wise Men Re-
port pp. 49-53, Henig, supra, n. 11, at 51-63,
105-117. See also Baldi (1981), Rivista di di-
ritto Europeo 134.
19. On this effect of COREPER the Three Wise Men com-
mented that the Commission ". . . should not, as'
so often happens now, be drawn into negotiating
with /national experts, etc./ to find a ,supposed-
ly acceptable form of the /policy/ measure".
They also commented that "/t/he Commission must
frame its proposals in a more independent man-
ner". Three Wise Men Report p. 54. COREPER does
of course increase the efficiency of the legisla-
tive system. For a positive analysis see Noel
and Etienne (1971) 6 Government and Opposition
422. But see, Tizzano, 'COREPER', Appendice, No-
vissimo Digesto Italiano (UTET 1981).

20. Three Wise Men Report at, e.g., 53 and passim.
21. For texts and brief commentary see conférence de presse du Président de Gaulle, September 9, 1965; Dichiarazione del Consiglio dei Ministri delle CEE, Bruxelles, Oct. 26, 1965; Communiqué de presse sur les accords de Luxembourg, 29 janvier 1966. All in R. Ducci, B. Olivi (eds.), L'Europa Incompiuta 411-422 (Padova, Cedam, 1970). See also P.J.G. Kapteyn and P. VerLoren-van Themaat, Introduction to the Law of the European Communities (London, Sweet & Maxwell, 1973) at 143-146.
22. E.g. the procedure in the Agricultural Management Committees. See text to note 30 infra.
23. E.g. Article 126 EEC--"The Council, after receiving the opinion of the Commission . . . , may . . . unanimously determine what new tasks may be entrusted to the European Social Fund."
24. I.e. where the Treaty provides for a qualified majority in Council a small number of states can veto a decision.

25. See, O.J. 71, 4.11.1961; O.J. L 326, 29.12.1969.

In relation to agreements based on Article 238 EEC which does not provide for a consultative Committee, the Council set up a group of national observers who "constitute . . . more than token representation, although less than active intervention". Bot, Negotiating Community Agreements: Procedure and Practice, C.M.L. Rev. 286 at 294 (1970).

26. Among commentators there is no dispute about the decline in the Commission role although opinions differ about the appraisal of the phenomenon.
- Costanis, The Treaty-making power of the European Economic Community: The perspective of a Decade 5 C.M.L. Rev. 421 (1967-8), Alting von Geseau, The external representation of plural interest, 5 Journal of Common Market Studies 426 (1967) and Leopold, External Relations power of the EEC in theory and practice I.C.L.Q. 54 esp. at 59-62 (1977) tend to be more critical of this development. Bot, supra, n. 25, offers a more balanced approach maintaining that the exigencies of international relations and their conduct make this development largely inevitable.

27. Costanis, supra, n. 26, at 435.
28. Id., p. 434 (emphasis added). But see Bot, supra, n. 25, at 309-310. For an amusing account of the technical obstacles which this negotiating pattern produces, see W. Field, The European Community in World Affairs (Alfred Publishing, Washington, 1976) at 105.
29. See generally Weiler, The European Parliament and Foreign Affairs: External Relations of the EEC in Cassese, supra, n. 13, at 151; and J. Weiler, The European Parliament and its Foreign Affairs Committees (Padova, Cedam, 1982).
30. See Council and Commission Committees, Supplement 2/80 Bull. E.C. (Commission of the European Communities, Luxemburg, 1980) at 18-19.
31. Id. at 22.
32. The Court of Justice affirmed the legality of Management Committees and even seemed to approve their political role. In a case before the Court

it was argued first that since execution of poli-

cies involved legislative functions it should have been left entirely in the hands of the Council. The Court first acknowledged the distinction: "according with the legal concepts recognized in all Member States, between . . . measures directly based on the Treaty itself and derived law intended to ensure their implementation. It cannot the Court concludedtherefore be a requirement that all the details of the regulation concerning the Common Agricultural Policy be drawn up by the Council . . .". An alternative argument was that the ". . . Management Committee procedure . . . constituted an interference in the Commission's right of decision, to such an extent as to put in issue the independence of that institution. Further the interposition between the Council and the Commission of a body which is not provided for by the Treaty is alleged to have the effect of distorting the relationships between the institutions and the exercise of the right of decision." The Court's reply was that the Management Committee procedure was a legitimate exercise by the Council of its power under Article 155 to stipulate conditions under which it would delegate power. Thus

per the Court: "Without distorting the Community

structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary." Case 25/70 Einfuhr- und Vorratsstelle v. Köster /1970/ II E.C.R. 1161 at 1170-1171; Recitals 3-10 of Judgment.

33. Accord - Doc 115, 1968-69 at 30.9.68 of European Parliament and Resolution of 3.10.68 O.J. C 108 p. 37.
34. See generally Proposals For Reform of the Commission of the European Communities and Its Services, Report made at the request of the Commission by an Independent Review Body Under the Chairmanship of Mr. Dirk Spierenburg (Commission of the European Communities, Brussels, 1979).
35. A recent event has been the intervention in January 1981 by the British Prime Minister with the President of the Commission as regards the portfolio of one of the British Commissioners.

36. The so-called "mixed agreement". See Kapteyn & Verloren Van Themaat, supra, note 21, at 351 ff.
37. See Trubek/Bourgongie (Florence project).
38. See Heller/Pelkmans (Florence project).

THE SYSTEM OF COMPLIANCE

There remains one crucial factor missing from the structural analysis. What are the ties that keep the framework together? By what means has it been possible to preserve the integrity of the system despite the evident decline in decisional supranationalism, the outright hostility from certain national quarters and the lack of independent federal enforcement mechanisms the evolution of which one would normally expect to accompany the development of normative supranationalism?

A. Withdrawal or Selective Application?

The natural departure point for a reply would be an examination of the possibilities of Member State withdrawal from the Community. Here again we find if not a cleavage between legal and political analysis at least a sharp difference of emphasis. Juridically, in discussing withdrawal from the Community a distinction is drawn between the European and Steel Community on the one hand and ~~the~~ European Economic Community and Euratom on the other. As regards the former, Article 97 ECSC provides that "This Treaty is concluded for a period of fifty years...". As regards the latter, Articles 240 EEC and 208 Euratom provide respectively that "This Treaty is concluded for an unlimited period." A recent study based on general international institutional law,^{1/} cogently argues "... that no right of withdrawal can be implied in the case of treaties like ECSC..

The same view is reached as regards the EEC and Euratom, namely that the aforementioned Articles "... exclude any implied possibility of unilateral withdrawal" since "... no other meaning which could be given to these provisions would not make them redundant".^{2/}

This juridical argument is curtly dismissed in a political analysis of the Community system: Pryce argues that "[t]he question of unilateral withdrawal is not dealt with in any of (the Treaties) -- for the good reason that none of the partners was willing to tie its own hands with regard to this matter The silence on this means quite clearly that each of the signatories maintains absolute authority to take such decision at any point in the future. The fact that the Treaty of Paris was concluded for a 50-year period and the other two for an unlimited period is irrelevant in this context." ^{3/}

This legally erroneous statement has a strong measure of political truth behind it. Should a Member State be determined to withdraw, lack of legal consent from its partners will not be an ~~insurmountable~~ obstacle in its way. The general Hobbesian maxim that covenants without swords are but words is accurately reflected by Pryce in his statement that in the Community "[t]here is no army to convince a reluctant partner". ^{4/} The real glue that binds the Community together is the bond of common vision and common interest in pursuing what has aptly been called "Alliance Politics". ^{5/} Withdrawal, even if not accompanied by subsequent economic retaliatory measures, would prove painful to all Member States

Does this mean that the discussion of withdrawal is irrelevant to an understanding of the supranational system? It is submitted that the question of unilateral withdrawal is politically futile. Unlike pre-World War II practice, it is rare in the life of contemporary international organisations for states to withdraw their membership.^{6/} The more common pattern is one of selective compliance by states with those duties and obligations of membership which seem to conflict with national interests. Given the wide range of duties and obligations which flow from Community membership, such a practice, if successfully adopted, would be lethal to the Communities. Equally common is the failure of international organisations to adopt sanctions against breaches or--on those occasions when measures are adopted--to enforce them effectively. The essence of what for convenience I call the "all-or-nothing effect" in the European Communities is that whereas Member States retain the ultimate political option of withdrawing from the Community and thereby disengaging from their obligations of membership (an option which the process of economic and political enmeshment has made increasingly difficult but not impossible), they are--as long as they opt for membership--largely unable to practice complete selectivity in compliance with Community obligations. I do not

of course mean that infractions have become impossible; no legal system

can guarantee this. Rather the supranational system of compliance attaches to international norms the habit of submission associated with national ones and provides in cases of breach fairly effective remedies. The "all-or-nothing effect" means, above all, the removal of expediency as a primary incentive for compliance with individual measures, and the replacement of the virtually voluntary character of state obedience which characterizes the classical international legal order with a binding judicial process. There still remain, for reasons which will be explained below, certain lacunae in the full realization of the "effect", but it has certainly reached a stage where it can be stated as a fundamental of the supranational system.

We have already noted the central role of the Court of Justice in the evolution of supranationalism. But the existence of a court as part of the institutional framework of an international organization is not unique and cannot, as such, explain the "all-or-nothing effect", nor can the existence of a compulsory jurisdiction per se be sufficient explanation since--as recently exemplified^{7/}--without effective sanctions submission to the compulsory jurisdiction and subsequent obedience to an award are among the obligations which in the current state of international law can often be flouted with impunity. Rather it is the entire system of judicial review, involving both national courts and the European Court, which

transnationalizes mechanisms hitherto used only in the context of municipal judicial review, ^{8/} which produces the "effect".

B. The Functional Division of Adjudicatory Tasks and Judicial Review ^{9/}

The Community features a double-limbed system of judicial review which operates on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: a) (the first limb) those of the Community legislative and administrative institutions (principally Council and Commission) which are reviewable for conformity with the provisions and principles of the Treaties and with an emerging unwritten higher law based on the constitutional traditions of all Member States as well as international treaties such as the European Convention on Human Rights; ^{10/} and b) (the second limb) acts of the Member States which are reviewable, in accordance with the principle of supremacy, for conformity with Community law itself. Needless to say, in the context of compliance of Member States with Community obligations, effective review of the latter set is the crucial issue. ^{11/}

a. Judicial Review at the Community Level

Judicial review may take place exclusively at the level of the Community Court. As regards the first--for our purposes less critical -- limb, the organs of the Community and the Member States, as well as individuals, may, in accordance with the Treaty, ^{12/} challenge Community acts and measures

(as well as inaction) directly before the European Court. As may be expected the rules of standing for individuals are quite narrowly defined and the Court has added to this narrowness by interpreting them rather strictly. ^{13/}

As regards the second -- critical -- limb the Commission and Member States may, in accordance with the Treaty, ^{14/} bring an action against a Member State for failure to fulfil its obligations under the Treaty. In general failure to fulfil an obligation may take the form of inaction in implementing a Community obligation or enacting a national measure contrary to Community obligations. Although, as indicated above, not unique, the very existence of a non-optional judicial forum for adjudication of these types of disputes sets the Community above most international organisations. Moreover, both the primacy which the Commission has in this procedure, being charged under Article 155 EEC with ensuring ". . . that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied" and the procedure under 169, are novel. As noted by one commentator, "under traditional international law the enforcement of treaty obligations is a matter settled amongst the Contracting Parties themselves. Article 169, in contrast, enables an independent Community body, the Commission, to invoke the compulsory jurisdiction of the European Court against a defaulting Member State". ^{15/}

At the same time the "intergovernmental" character of this process and the consequent limitations on its efficacy are clear enough. Four weaknesses are particularly glaring.

- i. The political nature of the procedure

In the first place, the decision of the Commission and/or Member States to bring an action against an alleged violation by another Member State will often be influenced by (other extraneous) political considerations. The existing problems of the decisional process (as described in chapter three) have sensitised the Commission to any "unnecessary" obstacles in getting proposals past Member State controls. Since Directorate Generals within the Commission are responsible for the decisional process vis-à-vis the Council, this responsibility might induce Directorate Generals to prevent the opening of Commission infringement proceedings as this might have ". . . adverse effects on the progress of a particular proposal in Council".^{16/}

Moreover, the Commission, as required by the infringement procedure, will strive to reach a friendly settlement with the infringing Member State. This settlement might not necessarily fully remedy legally the infringement.^{17/} The Commission might be particularly reluctant to bring an action against a violation committed by a national judicial decision. As we shall see, securing the cooperation and confidence of national Courts is a cardinal objective in the

done by an action brought against a Member State for an alleged violation by one of its Courts might be counter-productive.^{18/}

ii. The problem of monitoring

Effective supervision by the Commission depends on the ability of the Commission to monitor compliance with Community law. As we shall see in chapter ten below, given the vast range of Community measures this has become an impossible task.^{19/}

iii. The appropriateness of Article 169 for "small" violations

The type of action which is likely to be brought will relate largely to abject Member State failure to implement a national measure required by Community law or to a gross violation of an existing norm. It will be far less suited to review of the ordinary application and enforcement by Member States of Community obligations especially as they affect individuals. That type of violation becomes normally transparent only through cases and controversies affecting individuals. Even if alleged violations were brought to the attention of the Commission, it is unrealistic to expect them to take up all but the most flagrant violations.

iv. The lack of real enforcement

Finally, although in most cases either the prospect or actual commencement of infringement proceedings are sufficient to terminate

a violation and even more so an actual judgment by the Court condemning the violation, given the inter-governmental character of this process, a Member State found to have failed to fulfil an obligation may simply disregard the judgment against it. ^{20/}

b. Judicial Review at National Level

These weaknesses are to an extent remedied by the review of both limbs at the national level, a process possible through the functional division of judicial tasks between the European Court of Justice and national courts and which essentially produces the "all-or-nothing effect". It is hardly worth mentioning the fundamental importance of Article 177. ^{21/} This multi-functional Article provides inter alia that when a question concerning either the interpretation of the Treaty or the validity and interpretation of acts of the institutions of the Community is raised before national courts, the latter may (and in the case of courts of final instance, must) refer the issue for a preliminary ruling of the European Court of Justice. Once this ruling is made it will be remitted back to the national court which will give, on the basis of the ruling, the decision in the case pending before it. The national courts and the European Court of Justice are thus integrated into a unitary system of judicial decision making. The two limbs of judicial review exist on this level as well. A reference to the Court on the validity of acts of institutions is clearly a mode for judicial review of Community acts at the instance of individuals. One will note that the question of locus standi from the point of view of the European Court does not arise. Thus it may even be possible

before the European Court but have the act reviewed if he has standing in accordance with national procedural law. The individual will be able to challenge the Community act in the national courts (Community law being, of course, part of the "law of the land"), whereupon it will be remitted to the European Court of Justice for an interpretation on validity and returned to the national court for pronouncement. ^{22/} Taking then judicial review of Community measures as a whole, the trend, in respect of individual challenges, is one of a restrictive attitude to actions brought directly before the European Court with a shift to national courts as the forum for adjudication, using, when necessary, the preliminary reference for an interpretation or check of validity, of a Community measure. The judicial practice of restricting standing at the European level might be construed as a deliberate measure by the Court of Justice to encourage the integration of national Courts into the Community review system. Numerically however challenges to validity remain still a small portion of the cases brought under Article 177.^{23/}

Turning to the second limb concerning the judicial review of national measures for conformity with Community law, the European Court has made astute use of that part of Article 177 which provides for references on the "interpretation" of Community law. On its face the purpose of the procedure is to guarantee uniform interpretation of Community law in all Member States. However, often the factual situation in which Article 177 is employed is when a litigant pleads

law or an administrative practice, should not be applied as it is in contradiction with Community law. On remission to the European Court it renders its interpretation of Community law within the factual context of the case before it. Theoretically, a division exists in the adjudicatory tasks of the two courts: the European Court states the law and the national court applies it -- using of course the principle of supremacy where necessary -- to the case in hand. Thus the traditional formula of the Court is to state that:

... The Court of Justice ruling under Article 177 of the EEC Treaty does not hold that a given national law is incompatible with Community law ... Within the context of the judicial cooperation established by the provision it is for the national courts, applying the fundamental rule that Community law takes precedence, to uphold the right, of the subjects based, under the Treaty itself on the direct effect of the provisions concerned when disputes are brought before them by those concerned. 24/

But as usefully concluded in a study on the role of the European Court in judicial review:

It is no secret, however, that in practice, when making preliminary rulings the Court has often transgressed the theoretical borderline ... it provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision. 25/

The Court of Justice must then tread a very delicate line. On the one hand it has to assert as unequivocally as possible the obligations imposed by the European Community. On the other hand it must respect the judicial autonomy, even the dignity, of its national interlocutors. In certain situations this balancing act is not easy to achieve.

law seemed so cardinal that no compromise was possible even at the cost of "antagonising" the Italian supreme Constitutional Court. In two other famous decisions, Van Duyn and Henn and Derby, it is my submission that the European Court compromised substantive Community law in order not to embarrass the English High Court in the difficult period of the Referendum and the House of Lords on its first reference to the Court. A full assertion of Community law in those cases in areas to which public opinion was relatively sensitive (migration, pornography imports) could have been damaging to the relations between the Courts and perhaps even to the Community as a whole.^{25bis/} Likewise as we shall see below, when the Court does indeed respect the demarcation line between interpretation and application, national courts may take advantage and misinterpret the European Court's interpretation (Santillo).

What is important in the procedure, indeed crucial, is the fact that it is the national court albeit acting in tandem with the European Court which gives the formal final decision on the compatibility of the national measure with Community law. The main result of this procedure is the binding effect and enforcement value which such a decision has on a Member State -- coming from its own courts -- as opposed to a similar decision

wearing its inter-governmental hat. This then is a procedural dimension of the Constitutionalization of the Treaties since through it the rule of law -- of which the habit of obedience, even of the state itself, to the rulings of courts is probably the most fundamental aspect -- is incorporated into the supranational system. ^{26/} The quest for an effective law of nations in the traditional international legal order has been characterised by the creation of a succession of international courts, tribunals, arbitration bodies and other judicial and quasi-judicial fora. With a few exceptions these bodies have all been victims of the inherent weakness of the rule of law on the international plane. International jurisprudence, with all the attention it receives from scholars, has remained on the periphery of international law and international relations. By contrast, the supranational system -- in a synthesis of international law and constitutional law -- puts the inherently stronger national system in the service of the transnational order. Returning thus to the central theme of this study we can observe a double interaction between law and politics. In the first place we have the political consequence of the special procedure for judicial review as found in Article 177: the inability of a state to disobey its own Courts. That itself however would probably not have sufficed since it was primarily the judicial rendering of the concept of "interpretation" as found in that Article which converted it into the instrument of compliance which it has become. But we can go even further by linking our present analysis of the system of compliance to the earlier analysis of the evolution of normative supranationalism.

The functional utility of Article 177 in this context depends, naturally enough, on the direct effect of the Community source of law that can be invoked in the national forum. The clear policy of the Court to expand the boundaries of direct effect virtually transforming the concept into a rule of interpretation applicable to practically all the sources of Community law, has been no less instrumental in boosting the system of compliance to its current relative strength.

c. All or Nothing: The Limitations

The above analysis helps to bring to light the current limitations and lacunae in Judicial Review under Article 177. Four main limitations might be mentioned.

First, it is clear that not all issues involving alleged violations of Member States' Community obligations can become case-and-controversies involving individuals. Many obligations do not produce direct effect and rest in the province of intergovernmental relations, violation of which remains a matter for the Commission and Member States.

Second, even in matters potentially involving individuals there will exist inevitable "access-to-justice" barriers to overcome. Ignorance of the European rights, the increased cost and time which the two tier litigation involves (the procedural

price of the system of compliance) and the fragmentary diffuse character of the rights which might entail a very low stake for any one individual (in Costa v. ENEL the controversy involved a sum of approximately one Pound sterling) are the more obvious barriers.

Third, the use of Article 177 as a method for judicial review of Member State compliance will depend on the acceptance by national courts of the utility and/or duty to make references. The practice in this respect although encouraging is not complete.^{27/}

Finally, preliminary rulings, once received by the referring court must be followed both by that court and the national administration. Here as well the system displays certain breaches either overt as in the case of the Conseil d'état or of a more subtle kind. ^{28/}

We may now return to our early discussion of judicial review which takes place at the European Court level (and principally the procedure for state compliance under Article 169). In analysing that procedure we noted its novel features, *especially* the official role of the Commission and the binding jurisdiction of the Court (which is not open to reservation). We noted however several weaknesses (political influence, problems of monitoring, the irrelevance of the procedure to minor infringements, and the lack of enforcement mechanisms). The analysis of Article

177 review procedure illustrated how these weaknesses were

the weaknesses of the 177 procedure may be remedied--
in part or in full--by the procedure at the European
level:

- violations which do not involve case and con-
troversies and thus can not give rise to indi-
vidual actions come, ipso facto, under the ju-
risdiction of the Commission which can then
prosecute them.

- Access-to-justice problems can be alleviated
if the Commission picks up a case the exist-
ence of which it has become alerted to by in-
dividual action (or, indeed, complaint).

There is scope to investigate potential for
Commission subsidy of cases brought by indi-
viduals.

- The Commission cannot of course intervene di-
rectly in the practice of courts making refer-
ences or in faithful application of the inter-
pretation given by the Court of Justice. But
failure to implement faithfully could in it-
self become a ground for subsequent proceed-
ings under 169 especially if the administra-
tive or legislative practice at the source of

the individual action is not eradicated. In

this sense the Commission can avoid an action concerning directly a national judicial abuse.

We see then how the two levels of judicial review combine and complement each other so as to minimise the weaknesses to be found in each singly.

There is one more dimension worth mentioning in the context of compliance. I have so far placed main emphasis on the system for ensuring compliance of Member States with their Community obligations. I have paid less attention to review by the Court of Justice of the legality and "constitutionality" of Community measures. There is an indirect important connection between the two. In chapter seven I shall, in a different context, analyse the evolution by the Court of Justice of a higher law of human rights by which to review Community law. My suggestion is that the firmer the controls imposed by the Court of Justice on the Community organs seem to the national courts to be, the easier it may become to persuade these national courts to partake in the new judicial structure, to accept the authority of European Law and respect the cardinal role of the European Court itself.

Once again I have to emphasise that the

emergence of an "all-or-nothing" effect does not eliminate the problem of Community law infraction. A binding system of judicial review is at best a necessary condition for a high level of legal observance. In addition the system will have to have efficient supervision and policing mechanisms so as to bring the judicial system into operation. Law infraction by individuals or even state organs may occur even within municipal legal systems where -- at least in Western democracies -- the rule of law seems to be an enshrined principle. In fact the Community is beginning to display a classical tension between the constitutional principle of legality encapsulated in the reduction of voluntariness within the system of compliance and the policing difficulties resulting from certain weaknesses in the political organs. This problem of faithful implementation, application and enforcement of the expanding Community law and policy will be dealt with in chapter 10.

Footnotes

1. Akehurst (1979) 32 Current Legal Problems 143.

The leading authority on withdrawal generally is Feinberg (1963) 39 British Yearbook of International Law [BYBIL] 189, on whom Akehurst draws.

2. Akehurst, supra, n 1, 151. A view shared even by "... international lawyers from Communist countries, which normally argue that there is an implied right of withdrawal from international organizations". Id. This accords of course with the European Court of Justice view. See, Case 128/78 Commission v UK [1979] ECR 419, 429 and Case 7/71 Commission v France [1971] ECR 1003. In the latter case the Court said (dealing with Euratom but in a reasoning which can be applied to the EEC) that "[t]he Member States agreed to establish a Community of unlimited duration, having permanent institutions invested with real powers, stemming from a limitation of authority or a transfer of powers from the states to that Community. Powers thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone, except by virtue of an express provision of the Treaty." For a contrary academic analysis, see Dagtoglu, How Indissoluble is the Community?, in P.D.Dagtoglu, (ed.), Basic Problems of the European Community (Blackwell, Oxford, 1975).

3. R. Pryce, The Politics of the European Community (Butterworths, London, 1973), at 55. Since the Travaux of the Treaties of Paris and Rome have not been released it is difficult to see how Pryce can be so assertive in his submission.

4. Id.

5. "Alliance Politics" is the refinement of the "bag of sticky marbles" concept. See A. Shonfield, European Integration in the Second Phase: the Scope and Limitation of Alliance Politics (The University of Essex - Noel Buxton Lecture, 1974).

6. See Feinberg and Akehurst, supra, note 1, and examples therein. Indeed, in the few cases cited "withdrawal" was subsequently construed as "inactive membership".

7. See, Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (1980) 19 International Legal Materials 555.

8. See M. Cappelletti, Judicial Review in the Contemporary World (Bobs Merrill, Indianapolis, 1971), esp. Ch. 4; and Cappelletti (1978) 23 Rivista di diritto processuale 1.

9. On the system of judicial review generally, see e.g., the erudite treatment by H.G. Schermers, Judicial Protection in the European Communities (Kluner, Deventer, 1979); L. Neville Brown and F.G. Jacobs, The Court of Justice of the European Communities (Sweet & Maxwell, London, 1977); G. Vandersanden and A. Barav, Contentieux Communautaire (Bruylant, Brussels, 1977). A. Tizzano, La Corte di Giustizia delle Comunità Europee (E. Jovene, Napoli, 1967). Naturally my treatment here will only sketch the bare limbs of the complex system.

10. See, Schermers, supra, n 9, § 53 - § 144 (at 31-80).

11. In this context one may recall the words of Justice O.W. Holmes: "I do not think the U S would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be impeded if we could not make that declaration as to the laws of the several States." Collected Legal Papers 295-296 (Peter Smith, Reprint 1952).

12. E.g., Articles 173, 175, 184, 215 EEC.

13. Cf. Stein and Vining in F. Jacobs, European Law and the Individual (North-Holland, Amsterdam, 1976) 113.

14. E.g., Articles 169, 170 and 93 EEC.

15. Evans, The Enforcement Procedure of Article 169 EEC: Commission Discretion, 4 E.L.Rev. 442, 443 (1979).

16. C.D. Ehlermann, The Role of the Legal Service of the Commission of the European Communities in the Creation of Community Law (University of Exeter, Exeter, 1981).

17. Cf. Case 80 and 81/77 Ramel v Receveur des Douanes [1978] E.C.R. 927; and see J. Usher, European Community Law and National Law (George Allen & Unwin, London, 1981) at 27.

18. Although from the legal point of view that would be permissible, see Case 77/69 Commission v Belgium [1970] E.C.R. 237, 243; Case 8/70 Commission v Italy [1970] E.C.R. 961, 966, where the Court explicitly refers to the usage of the procedure in cases involving any "constitutionally independent" institutions of a Member State. Courts, ex hypothesi, come under this rubric. See generally Ch. 10 infra and Evans, supra, note 15. An advocate general has suggested, questionably I submit, that it may only be used in cases of deliberate breach by a national court. Case 30/77 Bouchereau [1977] E.C.R. 1999, 2020. In any event the Commission has been reluctant to use the procedures against a Member State. Thus the Commission has apparently decided not to bring an action against France in the wake of the decision of the Conseil d'Etat in the Cohn-Bendit

19. See Commission observations in Case 144/77 Commission v Italian Republic [1978] ECR 1307.

20. See ch. 10 infra for a review of the practice of compliance.

21. Jacobs, When to Refer to the European Court, (1974) 90 LQR 486 (1974).

22. On the effect of an invalidity declaration under 177, see Usher (1981) 6 ELRev 284.

23. The substantive review grounds for legality under Art. 173 EEC and validity under 177 are largely similar although certain slight differences exist. See Schermers, *supra*, n. 9 , at § 371 (at 210-211).

The breadth of the remedy is also different. Under 177 which is, strictly speaking, an inter-court procedure the individual's right of arguing his case is more limited. There are problems as regards the ex tunc and erga omnes effect of invalidity declarations under Article 177. Cf. Bebr, 'Remedies for Breach of Community Law: Community Report' in FIDE, Reports of the Ninth Congress, 25-27 September 1980, Vol. 1: Remedies for Breach of Community Law (FIDE and Sweet & Maxwell, 1980) § 10, 10.6 - 10.6; and see Case 66/80 ICC v Amministrazione delle Finanze dello Stato (not yet reported); and chapter two infra.

24. Case 61/79 Amministrazione delle Finanze dello Stato v Denkavit Italiana [1980] ECR 1205, Recital 12 of Judgment.

25. Rasmussen (1980) 5 ELRev 112, 115.

Rasmussen's thesis, if correct, illustrates another subtle evolutionary trend in the system of judicial review. It is not proposed to discuss here all the various advantages and disadvantages that each limb of the system entails. It has e.g., been justifiably pointed out that the 177 procedure for judicial review of Member State actions does not allow the Member States sufficient facilities (by comparison to 169-170 EEC procedures) to defend their position before the European Court. See, UK House of Lords Select Committee on the European Communities (1979-80 House of Lords 23 Report, HMSO). See generally, Rasmussen, id., and comprehensive bibliography cited in n 6 therein.

25bis. Cf. Weiler, 44 MLR 91 (1981).

26. In Case 104/79 Pasquale Foglia v Mariella Novello [1980] ECR 745 the Court came under severe academic criticism for rejecting an Italian reference apparently engineered to produce a ruling in respect of French law. (See e.g., Tizzano (1980) 105 Foro It. IV, 256). We should not underestimate the embarrassment of the Court in having to

act in the knowledge that because of the special triangular situation of that case (involving France) the general normative effect of its judgment would be flouted. And see now Case 140/79 Chemical Farmaceutici v DAF (14.1.81); Case 46/80 Vinal v Orbat (14.1.81); Case 244/80 Foglia v Novello (16.12.81) (not yet reported).

27. For a useful attempt at analyzing the different pattern of references, see Mortelmans (1979) 16 CMLRev 557. See also R. Lecourt, L'Europe des Juges (Bruylant, Brussels, 1976) 273-283.

28. Thus, the English Court of Appeal in deciding against the applicant in Secretary of State for the Home Department, ex parte Santillo [1981] 2 AllER 917 illustrated how, if it "... approves of a rule of English law, no amount of EEC law will deflect [it] from giving the former priority." 'European Legal Movement Shows Signs of Strain', Financial Times 22.12.1980 at 16. But see, Barav (1981) 6 ELRev 139, esp. at 159. And see chapter ten infra.

Chapter Five

Law and Politics: Patterns of Interaction

We have seen now three fundamental dimensions of Community development: the evolution of normative supranationalism which was essentially the legal process of constitutionalisation of the treaties; the evolution of the decision making processes, essentially an interplay of political organs; and the development of the system of compliance within which we observed a special interplay of the Community Court and its national counterparts but which involved by its nature a contact between judicial and political activity. Let us take first the two former developments--normative and decisional supranationalism. Is it possible to connect the two? To suggest some interaction between these two dimensions of the Community?

My tentative answer is positive but the nature of this connection should be carefully qualified. The evolution of each of the two dimensions was a highly dynamic process. I submit that to a large measure each followed its own logic and its own dynamics. Thus, for example, once the Court took the

major constitutional leap in Van Gend en Loos there was a legal logic enshrined in the concept of uniformity which led from the doctrine of direct effect to supremacy and preemption. Likewise, with the passage of time, the increased relevance of the Community and negative integration became felt and ~~this relevance~~ coupled with internal developments within the Member states were all factors which gave impetus to the process of diminution of supranational decision making.

To suggest an internal logic does not however exclude mutual impact and influence. The very constitutional leap mentioned above was undoubtedly prompted in part at least by a profound political conviction on the Court's behalf that the concept of a "Community" could not develop without a constitutional basis. This vision was shared by the Commission or, at least, its legal service. For as Stein has demonstrated, the initial concept of the "special legal order" was born in the Commission and in the unfolding of the constitutionalisation process the Court enjoyed with few exceptions the support of the Commission.¹ This was important since it meant that the Court's policy even if revolutionary was not isolated and enjoyed at least the support of one of

But I would suggest that one could go even further and find a connection which involves the totality of these developments. For, it is submitted, the outcome of the combined processes represents a certain balance of action and reaction, whereby the permeation and expansion of Community influence--expansion in breadth expressed by the growing number of fields where Community impact is felt and expansion in depth as expressed by the approfondissement of normative supranationalism--was matched and responded to by an ever closer national control exercised in the decision making processes. To this extent the approfondissement and diminution may be regarded as antidotes to each other producing, in a two-way process, a certain balance by a cyclical interaction of the judicial-normative process with the political-decisional one. Here then is one dimension of the Community formula for attaining an equilibrium between whole and part, centripetal and centrifugal, Community and Member States. It is an equilibrium which explains a seemingly irreconcilable equation: a large, surprisingly large, and effective measure of transnational integration coupled at the same time with the preservation of strong--

unthreatened--national Member States. It is this equilibrium which may perhaps explain the overall stability of the system and its resilience to recurring crises generated within and outside. It explains how the Member States were able to "digest" the constitutionalisation of the Treaty and the normative evolution unprecedented in other international organisations. (We shall see below that this union of high normative and low decisional supranationalism may also give a key to reformulating the meaning of the concept "supranational system").

Shonfield, in his seminal political analysis of the Community, noted albeit in an unarticulated way, the duality. Perplexed, he juxtaposed on the one hand ". . . the extent to which the detailed operation of the Community powers is today jealously observed and controlled by the member governments"^{1bis} with, on the other hand, two European Court cases² which demonstrated the high level of what I have called normative supranationalism. He created the "bag of sticky marbles" metaphor to express this duality and, correctly, sought the explanation in the substantive features which both draw and repel the members of the Community: A Community characterised

on the one hand by a shared, historical, political and cultural background which, since repeatedly threatened by strife and conflict in the past and finding common economic and political exigencies in the present, was and is being pushed and drawn towards integration. But also a Community which is, on the other hand, equally characterised by a rich diversity which has evolved in a history of separate tribal, religious, linguistic, economic and political development complete integration of which is neither feasible nor desirable.³ The analysis of normative and decisional supranationalism complements the substantive explanation of the "bag of marbles" by giving it its structural expression.

But if on one level the diverging trends represent an equilibrium they also create a disequilibrium, since the divergence can also create a tension between the high level of legal obligation and a lower level of political commitment. We might already have the "two speed Europe"; not the one often canvassed between north and south but one which transcends the entire Community. One consequence of this tension might be a source of the emerging problem of compliance to which we shall re-

turn in chapter ten.

Further, the divergence also gives a clue to another of the paradoxes and inbuilt contradictions of the supranational system. For, the diminution of the decisional facet represents the rejection of the federal option and the approfondissement of the normative facet its affirmation only on one, albeit important, postulate: the juxtaposition, in relation to governance structures in non-unitary systems, of this federal option as against an intergovernmental one. But if we postulate a different axis, relating to the division of competences and the content of programmes and policies in non-unitary systems, an axis on which we would juxtapose the federal option against a centralist one, we would reach opposite conclusions. The normative structure and its main author the Court speak the language of centralisation. The concepts of supremacy, direct effect and preemption are, naturally, only meaningful in a non-unitary arrangement. They do not make sense where a single source of authority exists. But their rationale in the supranational system has been based on a unitary concept of uniformity, found, substantively, in the notion of one market and, procedural-

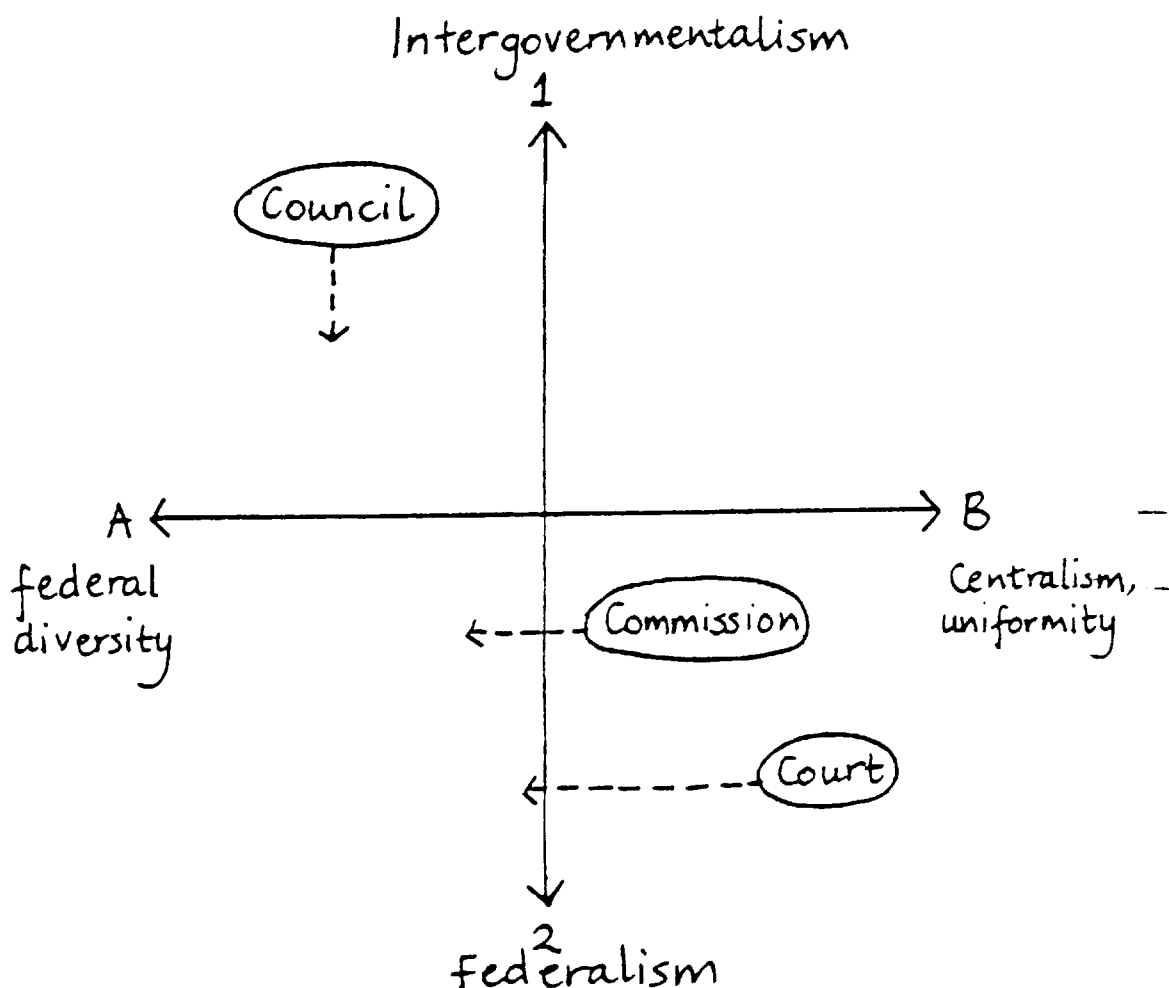
ly, in Article 177 EEC--as well as in the constitutionalising Court decisions. By contrast the decisional decline and the resurgence of the Member States are, ironically perhaps, an assertion, on the programmatic level, of the federal principle, and the sentiment echoed one of diversity. The divergence of the supranational trends, mirrored in the tension between uniformity and diversity, have important implications. For the Court, as we shall see in chapter eleven, it produces challenges, solutions to which are not easily found.

As regards the Commission one has the impression that it has not always appreciated that whereas the "federal" principle on what we have called the normative level is rooted in uniformity, when one turns to the programmatic level this same principle calls for a careful consideration of diversity claims and that an over-centralised ethos by the Commission in its programmes (based on the notion that Community law must always be one and uniform) may be an additional factor in burdening the decisional process.⁴ The divergence between normative and decisional supranationalism indicates that many of the tools for integration in the normative ar-

moury of the Communities--even the more subtle tools, like the directive--are likely to remain underemployed because of decisional difficulties. In the preparation of new policies and programmes the Commission will have to shift emphasis. In present conditions it is no longer sufficient to introduce grand programmes for uniform Community policies, based on a reasoned presentation of Community needs and potentials. In relation to each policy the Commission will have to engage in a micro-analysis of the barriers to Council decision making, which may vary from issue to issue, with a view to presenting programmes particularly sensitive to decisional obstacles as well as to normative ones. The tolerance to Member State variance, especially in positive programmes, may also be reassessed with greater circumspection being exercised in relation to proposed uniform laws.⁵ This will also mean that where a uniform law is necessary a greater insistence could be placed on the integrity of its application. In this context the discussion of committees takes a different turn. For what could be seen as a reduction in the Commission's autonomous executive role could be usefully employed, by that very Commission, as a device to re-
duce the decisional barriers. The greater the in-

volvement of the representatives of the Member States, the less reluctant may they be to new Commission proposals.

The Commission can, in certain fields, radically reassess its own role. Where the decisional barriers seem insurmountable it could abandon, selectively, its function as initiator of policies and engage in direct-voluntary-contact with the Member States to assist them to develop independent policies which may however serve Community ends. We can represent these new complex considerations in matrix form.



The 1-2 axis represents the distinction between high intergovernmentalism (1) and federalism (2). The A-B axis represents the distinction between federal diversity (A) and centrism^{al} (B). Historically we have found the Court and the Commission tending towards the lower right corner of the matrix: a strong rejection of the intergovernmental option but coupled with a strong commitment to uniformity, ~~and~~ the concept of one law. By contrast the Council has traditionally been in the higher left corner. A strong insistence on intergovernmentalism with a concomitant pressure for diversity. The new trend the signs of which are as mentioned noticeable in the Commission's tolerance of optional measures allowing national differences, in the Council's increasing usage of the Community framework for new policies which I shall analyse in Part Two, and in the Court's greater sensitivity to national diversities (chapter two) show perhaps the beginning of a movement to the lower left hand corner--the option of Community ~~solutions~~ coupled with a tolerance of diversity--the original federal idea. I shall come back to this issue in the conclusions.

Relating the two facets of supranationalism--

was made so as to give us an additional tool of analysis--provides us with a different set of terms of reference, albeit a tentative set, with which to examine the jurisprudence of the Court of Justice and the type of integrationalist philosophy which, as we saw above, was at the basis of its judicial policy. The Court's case law and judicial policy may be subjected to four different orders of analysis.

The first--technical-legal--order is concerned with ascertaining the precise meaning and parameters of the Court's judicial decisions. The recent Cassis de Dijon line of cases is still troubling interpreters grappling with a new judicial policy.

The second order of analysis is concerned with evaluating, in the strict legal sense, the correctness and legitimacy of the Court's case law. The debate surrounding the notion of direct effect as applied to directives is an example of this order.

The third order of analysis is concerned with the evaluation of the Court's case law as regards its impact on European legal integration. It hardly needs repeating that without the bold steps taken by the Court, the most important of which were discussed briefly in our analysis of the evolution of normative

supranationalism, the legal structure of the Community would manifest only a fraction of its present cohesion. So, unlike the second order of analysis, the terms of reference here go well beyond a strict legal evaluation of the legitimacy of the Court's judicial policy. They are widened to incorporate the impact of these decisions on the general architecture of the legal order.⁶ But even here the analysis is still confined to an area which flows almost directly from the Court's jurisprudence. The evaluation, to use our terminology, remains at the level of normative supranationalism.

The fourth order of analysis then will try to widen the terms of reference even further. The questions which will be asked--and to which, at this stage of research, only extremely tentative answers may be given--concern the relationship between the Court's case law and its impact in the normative field on the one hand and the decisional facet of supranationalism on the other. This is, of course, a two-way relationship. I do not of course propose to analyse all instances of this type of "micro" interaction. I believe this avenue of analysis can however be useful in relation to most areas of Community

casions to intervene. One or two examples should suffice. I have already suggested that, in general, in evolving its doctrine of preemption the Court will have been cognizant of decisional difficulties in the Communities' policy and rule making structure. To insist on pure preemption and expect it to work necessitates efficient central organs; the absence of these in the Community gives one explanation to the pragmatic--less pure--approach adopted by the Court in this instance. It was on the basis of this analysis that I had argued that what appeared as a retrogressive judicial approach was in fact part of the approfondissement process. One can be even more specific. In the areas of fisheries the Community for a long time now has been striving to adopt a common policy. Article 102 of the first Accession Treaty would even suggest the mandatory nature of such adoption. But owing to decisional difficulties the Council has not been able to adopt a comprehensive doctrine despite "prolongations" accorded by the Court. A certain turning point arrived when the Court had to give its decision in May 1981.^{6bis} Faced with this political paralysis, the Court could have adopted one of two extreme positions. Either acquiesce in polit-

ical failure and write the common policy off. Alternatively, if its jurisdiction in ERTA, and even Kramer, were followed strictly it could have totally preempted any unilateral national policy in this field thereby striving to force the Member States to act. But this high measure of legal preemption could have yielded two negative results: Firstly, the fish and fisheries industries might have suffered from such a hiatus in regulation. Secondly, there would be a serious danger of defiance by some of the Member States of such a decision. The Court instead adopted what I consider a highly imaginative compromise. It allowed the continuation of existing regimes but all changes and modifications would have to be subject to Commission approval. Here then was a pragmatic solution which did not totally obstruct regulation in the field but nevertheless put pressure on the Member States to adopt a policy, since the power given to the Commission in the interim period is not liked by any of the protagonists in Council. One sees thus a double judicial-political action. First it is clear that the Court is aware of the preemptory devices as a consensus forging catalyst. Secondly, the Court has been able to judge correctly the limits of Commu-

nity legal obedience and cohesion and has struck the preemption at an intermediate stage. One could at this stage only speculate whether the Court would have taken a different approach as regards preemption had the decline in decisional supranationalism not occurred.

Looking at the relationship the other way round we already suggested the possible negative effect to which ERTA may have contributed. One can imagine the policy difficulties if the Court were called upon to adjudicate in the debate regarding the responsibility for the expenditure of the Community budget.⁷ A "supranational" judicial decision could ^{simply} be countered by a political elimination of items of expenditure over which control would be denied to the Member States.

Let us turn with this mode of analysis in mind to the other ~~connection~~ discussed in the context of the system of compliance--the relationship between the European Court and national Courts. We may enquire whether the same type of dialectical process tentatively suggested as regards the normative and decisional structure of the Community may also occur in the relationship between the Court and its na-

tional counterparts. An even greater measure of caution is called for in assessing this problem. To be sure, negative national judicial attitudes to Community jurisprudence are usually conditioned by a variety of internal factors which have little to do with the posture of the European Court. But, on occasion, a link between Community judicial activism and national judicial hostility cannot be excluded. It is clear that the Court in Van Duyn failed to convince the Conseil d'État in Cohn-Bendit; that the logic of Rutili in which the Court stated the Community claim to control national concepts of public policy was equally unimpressive to Lord Denning and his colleagues in Santillo and that the Italian constitutional court in Comavicola was not convinced by Simenthal. But then, it is only natural to accept a measure of national judicial resistance in the face of some of the constitutionalising decisions. If the prospect of such resistance were to play a decisive role in the Court's policy making, little of the normative edifice would have been created.

At the same time let us not think that the European Court has not been aware of the "politics" of judicial cooperation. I have already suggested in

such as Van Duyn and Henn & Darby were influenced by a sensitivity to the delicacy of the circumstances and subject matter of the references. The first during the referendum in Britain for continued EEC membership, the second on a subject matter which had the potential of public notoriety. Sometimes the dialogue is more complex. Could it be that the recent stepping back in relation to the direct effect of directives (Ratti; Becker) was ^a reaction to the national unease spreading from France (Cohn-Bendit) to Germany (VAT Directive)? Indeed, could it be that this stepping back was not so influenced?

Another well-known dialogue is that relating to the issue of judicial protection of fundamental rights. Clearly the European Court in its jurisprudence (chapter seven infra) was anticipating and reacting to national judicial challenges. In conclusion then I suggest that on the whole the Court has well adjudged the impact of its activism and has-- say, in the case of direct effect of directives--even known when the time calls for tactical withdrawals.

I believe the greater peril lies paradoxically in judicial inactivism (active passivism), in the failure to act as a federal adjudicator as regards

the substantive expansion of the Community's jurisdiction. Because of the peculiar supranational features of the Community as a non-unitary system, once political consensus in Council is reached as regards jurisdictional expansion this may take place without the usual problems faced in some federal systems. For once the unison of Member States and Community interests in the Council produces the conditions which dampen national resistance. The very sharp but largely uncontested increase in the usage of Article 235 is evidence of this development.⁸ Most of the criticism has concentrated on the undemocratic nature of the decision making involved which excludes national parliaments. To be sure this is a role which may be given to the new directly elected Parliament. The Court, which itself had developed its own expansive version of implied powers, and which adopted a very liberal attitude of tacit encouragement towards political expansion has been criticised on the same grounds: as partaking, or sanctioning, an undemocratic process.⁹ I shall discuss these developments in great detail in Part Two of this study.

I wish to shift the arguments to another level.

as a programatic federal adjudicator might not only leave doubts as regards the legal and democratic legitimacy of the new Community policies as well as contributing to an abstract loss of confidence in the European Court by its national counterparts; it might have direct effects on the most hallowed normative principle--supremacy. The clearest illustration of this danger may be found in the Italian Constitutional Court decision in Frontini. Frontini is traditionally read as an affirmation of the supremacy principle subject to an explicit, if muted, human rights reservation. But the basis of acceptance of the doctrine rested on the functional division of tasks between Member State and Community: ". . . there is thus made by each of the Member States a partial transfer to the Community organs of the legislative function, on the basis of a precise criterion of division of jurisdiction by subject matter indicated analytically in the second and third parts of the Treaty . . .".¹⁰

This rationale is echoed in the jurisprudence and constitutional amendments of most other Member States. Should the functional division be seen to be breaking down without adequate judicial control

by the European Court it is difficult to guess what shape and depth national judicial resistance might take. When the Court developed its doctrine of fundamental rights its credibility was impaired since it was so clearly perceived as a response to a supremacy challenge rather than a genuine concern with human rights. A similar loss in credibility would accompany a reactive rather than active Court doctrine as regards jurisdictional limits.

One cannot turn round today and condemn the Court's activism for any negative impact this may have had on the decisional structure or judicial co-operation. Not only do these two latter developments have, as our analysis has shown, independent causes to which the normative evolution was only a contributing factor but without that jurisprudence we could hardly have spoken of a Community as we know it today; substantive achievements would be perhaps no more than, say, the GATT. Hamson's critique that in Van Gend en Loos and its progeny the Court was severing ". . . the legal world--the world in which it operates--from the world of what we call real or actual events"¹¹ may be turned on its head.

The Court's jurisprudence was inspired perhaps by

which international agreements lacking a normative framework have such limited impact. But however great the merits of the constitutionalising decisions it may still be useful to conclude this section with the profound historical warning so elegantly sounded by Dawson:

Judicial agencies have a peculiar power to enlist obedience and impose control--essentially . . . because they meet a deeply felt and constant need for trustworthy neutrals But there are limits to the allegiance that judges can inspire, as the experience of France reveals. The judges of pre-Revolutionary France became partisans in political strife for a reason that seemed to them persuasive--that other political agencies had failed In their attempt to fill a great gap in French political institutions they brought disaster on themselves and caused a lasting impairment of their own function.¹²

As mentioned above I believe the Court has perceived the danger and is in what one may call a period of judicial restraint.

The Distinction and the Union of Normative and Decisional Supranationalism: Some Theoretical Reflections

By way of concluding Part One we may return to some of the theoretical problems raised earlier as

national order. I think the distinction between the decisional and normative facets combined with the all-or-nothing principle enshrined in the Community system of compliance may be useful in shedding a different light on and perhaps even clarifying some of those theoretical problems. Five brief observations may be made in this context.

First the distinction and the different evolutionary paths alert us to the danger of adopting monolithic explanations or characterisations of the system. Studies suggesting an evolution from, say, "federal to confederal"¹³ are correct only on an extremely narrow definition of the concepts employed; so narrow as to reduce considerably their explanatory utility of a system rich in contradictions.

Although the distinction between the two facets underlined these contradictions, it enabled us to capture the inevitable processual character and express this in a meaningful way: the evolution of two diverging trends explicable both independently but also by their interaction with one another and their ensuing unique balance.

Secondly the distinction between the two facets

of supranationalism explains, at least partially, one

of the important reasons for the cleavage between legal and political structural analysis. Lawyers have tended to focus on the normative structure whereas political scientists have typically avoided this and concentrated on the decisional frameworks. (Naturally, in non-structural analyses, we will have to look for similar cleavages between law and economics and political science with both.)

The third theoretical consideration concerns the issue of sovereignty. The contribution of a purely structural analysis to the sovereignty debate can be but limited. The transfer of sovereignty is intricately bound to the weight and importance of the substantive areas over which jurisdiction is given, or evolves, to the components of the system.¹⁴ And yet the distinction between the two supranational facets can articulate with greater precision the often heard political notion that participation in the system does not only mean a loss of sovereignty but also a gain in terms of the influence of one state over its partners. As we saw it is the interaction of low decisional and high normative supranationalism--especially in areas of exclusive Community jurisdiction--which explains this phenomenon beyond the common

sense but generic observation that it is better to be within an important decision making forum than outside it. One Member State, even a small one, through the power of veto (low decisional) may influence important dimensions of, say, the agricultural or fisheries policies through the inability of the other partners to adopt unilateral measures (high normative). This direct influence extends beyond that possible in the normal international context. The 1981 British veto of the Fisheries Agreement with Canada is a recent example. To be sure, there would be a political price to be paid for continuous obstructionism, but the explanation of the very possibility is I think sharpened by understanding the distinction between the two facets.

Fourthly, the distinction between the two facets proved a means by which to identify the two intersecting and oft contrasting axes along which the Community is oscillating as a non-unitary system: The intergovernmental-federal axis and the centralised-federal one. The tension which this produces in terms of the competing claims of uniformity and diversity will have their effects in years to come.¹⁵

Finally, for what is perhaps the most far reaching, and hence tentative, conclusion we must consider the union rather than the distinction between the two facets in combination with the "all-or-nothing effect". For in this union, with its unequal weighting, we may possibly find the underlying principles of what we mean when speaking of a supranational system. In many international organisations we find a measure of decisional supranationalism. In the UN itself there is a surprisingly high measure manifest in, say, the voting rules of the General Assembly, the Security Council (with the known exceptions) and the various committees and affiliated organs, as well as in the independent role of the Secretary General.¹⁶ What is crucially lacking--and which accounts for the weakness of that organisation--is any real measure of normative supranationalism.¹⁷ By contrast, any multipartite treaty with self-executing measures among monist states will display at least a measure of this normative character but to the exclusion of the decisional facet. It is the union of the two within one framework which distinguishes structurally the supranational order from other international organisations. The different weighting and

especially the low level of the decisional facet--aggravated by the process of diminution--sets the system apart from non-unitary (federal) states. For in these states, the separate tiers of central and (member) state power with the independent source of popular legitimacy and functional allocation which the former enjoys, always result in a high central decisional level. Likewise if the "all-or-nothing effect", with all its current lacunae, is a valid characterisation of the system of compliance (a necessary component in any organisational analysis) then we may have found the complementary principle of the supranational order. For it is clear that the "all" mechanisms are precisely those lacking from other international organisations whereas the political option of unilateral pacific withdrawal expressed in the "nothing" option, is unavailable in non-unitary states. Extrapolating from the Community experience, the union of the normative and decisional facets and all-or-nothing compliance may provide a new economical way of structurally expressing the concept of a supranational system.

Notes

1. Stein, 75 AJIL 1 (1981).
- 1bis. A. Shonfield, Europe: Journey to an Unknown Destination (Allen Lane 1972) 10.
2. I believe Shonfield was alluding to Case 48/71 Commission v Italian Republic /1972/ ECR 532;
Case 48/69 Commission v I C I /1972/ ECR 649.
3. Shonfield, *supra*, n. 1, 17.
4. For criticism of this ethos, explicit and implicit, see e.g. Annex 3 to Three Wise Men Report 82-83.
5. The legislative programme is at times sensitive to this call for diversity even within "uniform" laws. See, e.g., Article 5 of Council Directive 75/129 on approximation of laws relating to collective redundancies OJ 1975 L 48/29. ("This Directive shall not affect the right of Member States to apply or to introduce laws, regulations

or administrative provisions which are more favourable to workers.") See also Council Directive 77/187 and Council Directive 72/160.

6. An excellent study is C.J. Mann, The Function of Judicial Decision in European Economic Integration (M. Nijhoff 1972). See also A.W. Green, Political Integration by Jurisprudence (Sijthoff 1969).

6bis. See Case 304/79 Commission v U.K (not yet published).

7. For the debate as to who is responsible for Community expenditure, see FIDE, Reports of the Ninth Congress, 25-27 September 1980, Vol 3: Possible Areas of Conflict between Community Institutions in the Implementation of Community Law (FIDE and Sweet & Maxwell 1980) esp. Ehlermann § 3, at 3.13 - 3.22.

8. This expansion is brilliantly traced by Tizzano, Lo Sviluppo delle Competenze Materiali delle Comunità Europee 21 Rivista di Diritto Europeo 139

9. See e.g. Giardina, The Rule of Law and Implied Powers in the European Communities 1 Italian Yearbook of International Law 99, 103 (1975).
10. [1974] 2 CMLR 372, 385 (emphasis added). The Italian Court further mentions that the Community subject matter must correlate to the general aims of the Treaty but this cannot be read as sanctioning wholesale expansion.
11. Hamson, Methods of Interpretation - A Critical Assessment of Results, Judicial and Academic Conference (Court of Justice of European Communities, Luxemburg, 1976) II.9. Cf. Kutscher: "There is no foundation for the view that the Court's decisions which lean in favour of integration have gone too far ahead of political realities." Id., I.47.
12. J.P. Dawson, The Oracles of the Law (Greenwood Press, Westport, reprinted 1978) XVI.
13. Cf. Taylor, The Politics of the European Communities: The Confederal Phase 27 World Politics 336 (1975). Naturally I do not claim that the pres-

ent study has avoided all disciplinary gaps.

Its structural nature for example excludes most discussion on the mainstream theories of European integration. A fairly recent assessment of the state of the art is Haas, Turbulent Fields and the Theory of Regional Integration 30 International Organization 173 (1976).

14. For a recent analysis by a lawyer, albeit in relation to a limited number of fields, which has examined this transfer is J. Usher, European Community Law and National Law (George Allen & Unwin, London, 1981) esp. ch. 3. L.N. Lindberg and S.A. Scheingold (eds.), Regional Integration, Theory and Research (Harvard UP, Cambridge, Mass., 1971) is an outstanding contribution which complements legal studies by offering means of measuring the impact. See esp. studies by Lindberg, 45-127 and Schmitter, 232-264.

15. Jacobs has neatly captured this tension in his characterisation of the system as a symbiosis between the various elements: supranational, integrational and federal. Jacobs, Florence

16. See e.g. L. Gordenker, The UN Secretary-General and the Maintenance of Peace (Columbia UP, New York, 1967) and Cox, The Executive Head an Essay on Leadership in International Organization 23 Int. Organ. 265 (1969). A useful theoretical discussion of determinants of influence may be found in E.B. Haas' classic Beyond the Nation-State: Functionalism and International Organization (Stanford UP, Stanford, 1964) 119 ff.
17. This is not to deny the positive influence the UN may have on the development of law and legal compliance but to suggest the voluntary, non-judicial nature of the UN system. See the balanced analysis of Henkin, International Organization and the Rule of Law 23 Int. Organ. 656, 664 and 680 ff. (1969).

PART TWO

Powers and Competences

In Part One of this study I dealt at some length with the vertical relationships (concerning actors and the decision making process as well as norms) between the Member States and the central organs of the Community. The analysis of normative and decisional supranationalism enabled us inter alia to explain some of the apparent contradictions of the system and to understand better a complex structure in which law and politics interact in a manner which retains its uniqueness among international organizations and associations of states.

However any analysis of a non-unitary system cannot be complete without a horizontal examination of the relationships focussing on the distribution of powers and substantive competences between the general, federal or transnational, organs and the constituent parts. The importance of the horizontal analysis is explicable in two related ways. Firstly, an international organization may have highly developed supranational structures and processes and yet remain of marginal significance if its sphere of operation—its jurisdiction—covers a very limited and relatively unimportant area. —————→

—————→ Thus the dynamics of jurisdictional change, the legal (normative) and

political (decisional) potential of the supranational structure to adapt to different substantive exigencies is no less important to our enquiry. Secondly, within non-unitary states the constitutional elements of supremacy, direct effect and preemption -- the judicial evolution of which so dramatically characterised the Community -- are usually determined by a written constitution either explicitly or may be found implied therein. They are rarely subject to per se challenges or controversy. Rather, the classical federal debate, has focussed on the demarcation line between federal and state competences or, in other words, the substantive areas in which the federal government is permitted to exercise its power backed up by the principles of supremacy, direct effect and preemption. The horizontal relationship is thus crucial to an understanding of both non-unitary international organizations and states. Whilst remembering that this vertical-horizontal taxonomy is designed only as an analytical tool enabling us to look in different ways or from different angles at the same phenomenon, we should not be surprised if the images that emerge by using these tools are themselves different. Thus, to give but one example, whereas in terms of vertical relationships supremacy emerged as a necessary

principle whereby federal law overrides Member State law, on the horizontal plane the same principle will have to be expressed as a concurrent supremacy of state and federal law each applicable within its own jurisdiction. The rule of supremacy can thus no longer be framed as federal/transnational law is supreme to member state law' but rather federal/transnational law and member state law are supreme in their respective spheres of competences. How that sphere of competences is determined, whether it is static or dynamic and who determines its reach will be among the questions which I shall examine in this part of the study.

It is the interaction of the two visions, horizontal and vertical, which may give us a comprehensive view of the structure of the non-unitary system. As mentioned above in non-unitary states vertical relationships are determined by the Constitution a fact which usually forecloses the potential for problems on this level. By contrast much of the legal history of federalism in these states is concerned with either the shift in, or stagnation of, the distribution of competences. And much of the political-economic history of the federal aspects of these systems has been concerned with tracing on the one hand the effect which distribution of power between

federal government and the states might have had on political economy and, on the other hand, with the extra-legal means (usually taxation and dispensation of resources) ^{1/} devised by federal governments to circumvent juridical jurisdictional limits. ^{2/} Since this study is concerned primarily with structure and process it becomes of lesser importance for us to try and list the actual demarcation of powers and jurisdiction within the Community. Rather I shall try to explore the principles which govern this distribution of competences and above all the dynamics which determine this distribution.

Traditionally, the horizontal relationship in non-unitary systems is conceptualised by the doctrine of enumerated powers and therefore it will be the manifestation of this doctrine in the Community system which will be the main focus of this part of the study.

As a doctrine, enumerated powers often expresses a belief in the importance of preserving the originally struck balance between transnational (or federal) and national (Member State) interests. Since in our analysis of normative and decisional supranationalism we saw the tenacity by which the governments of the Member States sought to preserve that balance in relation to the vertical relationship, ^{3/} we could expect that in the horizontal sphere, in relation to enumerated powers,

those
the Community would follow/federal models in which
enumerated powers were treated as strict and formally
loose and thus
preserved (Canada) rather than/dissipated (USA). And
yet examination of the evolution of the Community reveals,
in a system already rich in contradictions yet another
interesting double paradox. In the first place we can
detect a steady trend whereby the entire complex of
principles which would normally (and in fact did
originally) underpin a system of enumerated powers
is in the process of being dismantled. The result of
this process has been to open up the system and create a
potential for expansion unparalleled even in most major
federal states. If enumerated powers remain they do so
as a hollow rather than hallowed principle. My first
purpose in this part of the study will be therefore to
trace, and evaluate, the legal process whereby these
principles have been eroded enabling the potential for
expansion to emerge. The paradox deepens if we move to
the political level. For this development has not
remained in the realm of potential. Indeed on the level
of practice as noted by a leading commentator, the
Community system has, for some time, been showing "... una
tendenza fortemente espansiva delle competenze Comunitarie,
con risultati tali, anzi, da superare talvolta perfino
le previsioni dei più generosi osservatori". ^{4/} But,
whereas in other federal systems similar expansive

processes or tendencies were often at the root of fierce political strife between federal government and the states, in the Community these often dramatic mutations have been achieved with a surprising measure of equanimity not to mention connivance on the part of the governments of most Member States. So, my second purpose will be to try and explain why in a system the vertical developments of which might have suggested a strong resistance to such an erosion in both the principle and practice of enumerated powers, we have in fact this political support. In fact I believe that the explanation must and can be found in that very same supranational character of the Community. Finally I shall try and examine some of the legal and political implications of these phenomena as regards the future development of the Community. For whereas these developments may be considered encouraging for the process of European Integration, ^{they may also,} /to the extent that they are not matched by corresponding developments of a constitutional and decisional character, ^{they may also,} provoke a host of problems and dangers to the democratic character of the Community to the legitimacy of the judicial and political processes and in the long run they might even pose a danger to the very supranational structure of the Community itself.

Footnotes

1. See e.g. Soberman in Florence Project.
2. But c.f. Heller who challenges somewhat this traditional history as applied to the U.S.A. experience. Heller, Florence Project.
3. See Chapter 3 supra.
4. Tizzano, Lo sviluppo delle Competenze Materiali delle Comunità Europee, 21 Rivista di Diritto Europeo 139, 140 (1981).

Chapter Six

Enumerated Powers and Implied Powers: The Strict and Functional Doctrines

No one can doubt that this distribution ... of legislative powers between the Dominion and the Provinces ... is one of the most essential conditions, probably the most essential condition [in the Canadian federal arrangement] ... while the ship of state now sails on larger ventures ... she still retains the watertight compartments which are an essential part of her original structure.

Lord Atkin, Attorney General for Canada v. Attorney General for Ontario [1937] A.C. 326 (P.C.)

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

Marshall C.J., McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 421 (1819).

A. The Ideology of Enumeration

In the above two statements which must be the most well-known (and often abused ^{1/}) judicial pronouncements on implied powers —————→

are encapsulated the two poles between which the
debate on enumeration in non-unitary system

takes place. The contrast between these statements on the
possible change of the distribution of powers in federal states may
of course be attributable to the differences in the
constituent instruments establishing Canada and the
USA ^{2/} as federal systems. In addition, these different
approaches may be traced to the different style and
self-perception of their authors: the US Supreme Court
and the British Privy Council. ^{3/} Be that, for the time
being, as it may, they highlight an inevitable tension
which exists in any non-unitary arrangement and which
arises in a particularly interesting, and often distinct,
fashion in the Community system.

By their very nature the ^{different levels} of government in
non-unitary arrangements must operate ^{at least initially} a division of
ends and powers. The distinction between
different non-unitary systems may be explained by
reference to this division. We may classify the
different systems by reference to three characteristics
by which ends and means ^{can be} enumerated.

1. There may be a difference in the direction
and source of attribution from centre to
periphery or vice versa. Thus in a system of

regional government the centre will typically devolve powers on the regions. The regions' powers will be enumerated and all residual (inherent) powers will be retained by the central government. By contrast in a confederation and international organizations ^{and indeed in many federal states} the constituent members (the periphery) will bestow competences on the central organs and retain themselves the residual powers.

2. There may be differences in the legal status of enumerated ^{powers.} The demarcation may form part of the constitutional order and thus become more or less entrenched or, by contrast, it may result from a simple legislative act and be subject to change with greater ease. ^{4/}



3. Finally the actual division of powers and competences rationae materiae between the different tiers of government will separate one non-unitary system from another. In some systems foreign relations will, say, be conducted entirely by the central organs and in others the constituent member will partake in the process.

The methodological utility of these formal distinctions is twofold. It enables us to achieve a comparison which may be extended to all systems -

whether national or transnational. As we shall presently see this comparative potential between the national and transnational will enable us to understand better the political rationale behind the insistence on enumerated powers as a cardinal principle of any federal arrangement (including the Community) and thereby also explain why under certain conditions (which, in part, now prevail in the EEC) this resistance is misconceived. More importantly, the formal distinctions raise certain political expectations and legal presumptions. Thus, we would not expect that a region which enjoys non-entrenched devolved powers will be able significantly to exceed the competences attributed to it. Or, more cautiously, that a federal government or transnational organs whose powers are enumerated will be able to transcend the enumeration without certain important constitutional mutations even if these are not transacted through normal constitutional amendment.

(By all these indicia, the classical analysis of the Community and its constituent instruments would suggest a system strongly leaning towards a restrictive approach to enumeration. There is virtual unanimity among writers ^{5/} that the Community does not enjoy inherent powers; the establishment of the EEC must, so common wisdom tells us, be seen against the failure of attempts to construct

the EDC and the growing disenchantment of the Member States with the supranational characteristics of the Treaty of Paris. Indeed the term supranationalism was dropped from the Treaty of Rome. The direction of enumeration was from the Member States to the Community. In the EEC specific ends were bestowed ^{upon} ~~given to~~ the Community and enumerated in its first 3 Articles towards the execution of which limited powers, elaborated throughout the remainder of the Treaty were granted.

possible intended
The immutability of this original arrangement is suggested by the creation of   an extremely cumbersome amending mechanism. 6/
Finally, the actual enumeration was limited primarily to the trade and commerce field excluding large segments of economic policy (e.g. currency, taxation) let alone such areas as defence and education.

Utilizing thus the three indicia the Community emerges as a relatively tightly closed system, the mutation of which would be expected to encounter severe difficulties.

However, an insistence on relying on these three formal indicia of attribution as a descriptive tool in classifying and seeking to understand the variety of non-unitary systems can be dangerous. Formal attributions are often no more than an initial point

of departure. For we know that in dynamic systems rarely, if at all, have the original compétence d'attribution remained intact. The dry provisions of constitutions, legislative acts and treaties distributing powers between different levels of government are in a sense like a still photograph of a living organism at birth. With the passage of time, though the organism may retain some essential genetic traits, this character changes substantially.

I have already alluded to the expansive nature of the Community. What is remarkable is that for the most part the Community process of jurisdictional change and adaptation -- remembering that we are not concerned with the day to day implementation of the Treaties, but with those changes which affect the division of powers and competences between the Member States and the Community -- has occurred largely without recourse to the formal mechanism for Treaty (Constitutional) amendment, and contrary to the presumptions which the formal characteristics of Community enumeration would suggest. Since we are interested precisely in this process of change it would be only slightly more interesting to attempt to give an up-to-date description of the distribution of competences, functional or institutional, as they appear today at the beginning of the fourth decade of Community life. Such a description, valuable as it

may be in ascertaining the legality or otherwise of a specific act of the Community or in determining the permissible parameters of a new policy will give us only little insight into the process of the expansion. To the still photograph of the young organism at birth one will simply have added another one at maturity. Far more interesting and revealing will be an analysis which will explain the instruments and tools, the means and ways, by which, in relation to the delicate substantive and institutional demarcation lines drawn between Member States and the Community, the system was (and is) able to adapt itself to the changing economic, political and social environment both internal and external. Such an instrumental analysis may, if successful, not only provide us with a "cinematographic tool" not tied to any specific moment in the evolution of the Community but will also constitute an interesting prism by which to examine the interactions of political forces and legal principles in the Community.

If the three formal indicia of enumeration themselves are only partially relevant in explaining the actual life of non-unitary systems and as a means

of predicting in practice expansive developments, we are compelled to search for a deeper underlying principle. In search of this principle let us return momentarily to the North American experience. In two recent statements by acknowledged academic authorities ^(each) evaluating the ^(respectively) experience of Canada and the USA we may find a key to this deeper principle. Professor Wade in the context of the Canadian scene suggests that

The essential elements of a federal constitution are that powers are divided between the central and provincial governments and that neither has legal power to encroach upon the domain of the other, except through the proper process of constitutional amendment /The spirit ... which is inherent in the whole federal situation /is/ that neither side, so to speak, should have it in its power to invade the sphere of the other. 7/

By contrast, Professor Sandalow, reflecting a different American reality in the USA suggests that

The disintegrative potential of /questions concerning the legitimacy of governmental action/ is especially great when they involve the distribution of authority in a divided or federal system If Congress determines that a national solution is appropriate for one or another economic issue, its power to fashion one is not likely to be limited by constitutional divisions of power between it and the state legislatures. 8/

Certainly as I suggested above these two statements may be explicable by reference to possible differences in the formal characteristics of the U.S. Constitution

and the British North American Act as interpreted in the two jurisdictions. But they also disclose a principled difference in the value attributed to enumerated powers as part of the federal architecture of the two systems -- a difference between ends and means, functions and values. In the Canadian system the very division of powers is considered as a per se value--as an end in itself. The ^{devised} ~~form~~ of governance is regarded on par with the other fundamental purposes of a government such as obtaining security order and welfare. This approach may be called the ^{strict} ~~approach~~ to enumerated powers. In the United States, as they have evolved, the federal distribution retains its constitutional importance but, in the practice of that system and in the doctrine of its Supreme Court, there is a tendency to subject that principle of division to higher values and to render it as a useful means for achieving the higher aims of the American Union. To the extent that the division becomes an obstacle for the achievement of such aims (such as the preservation of the Union), it will give way and not be held sacrosanct. This may be called the functional approach to enumerated powers. To be sure this dichotomy is not total. We find strands of each in both systems. But as general trends the dichotomy of ends and means, function and purpose of

these two differing spirits of enumerations, retains, I believe, a validity in characterizing the two paradigmatic experiences. We must remember that the evolution of, or resistance to, one of these two orientations is a process which will happen over time and only gradually become part of constitutional doctrine.

Perhaps we can try and go even deeper and enquire why is it that enumeration as a form of governance should be regarded an end in itself -- an act of faith. In this context the comparison between internal enumeration (regionalisation) and external enumeration (federalism/transnationalism) which I mentioned before becomes relevant. As Mény cogently argues ^{9/} the drive for regionalism is explicable by reference to two dimensions: the cultural and the democratic. The cultural dimension is concerned with the preservation of cultural diversity expressed in its broadest forms such as language, ethnic customs and particularist history. Regionalism seeks to give territorial expression to this diversity. The centralist state often opposes the movement precisely because of its concern ^{for} national unity and central domination. The democratic dimension gives expression to an even more profound

exigency.

The division of power on territorial lines has been conceived of as an antidote to excesses of power, as a guarantee against centralization ... /as consonant/ with the idea of broadened democracy ... whereby decision making power is better exercised or better controlled by those it applies to. 10/

In the transnational/federal context wherein the member states are the units, the resistance towards "usurpation" of competence by the transnational/federal organs and the insistence on the preservation of original demarcations expressed by enumeration is the reflection of the same values operating in reverse. The fear is that a dissipation of strict enumeration and a transfer of competences from the constituent members to the general power will lead to an erosion in these twin values inherent in the enumeration: cultural diversity (even autonomy) and broadened democracy. Whether or not this rationale is objectively valid, it gives us a powerful explanatory tool in explaining negative attitudes towards transnational expansion and the erosion of enumerated powers.

(At least from the point of view of the Member States the lesser ^{the} threat of loss of power and autonomy to the Community as a general power the greater will be the tolerance towards jurisdictional expansion. At the same time this rationale should not be taken as an immutable criterion

by which to evaluate (morally) the process of change. As Meny himself explains, the rationale of regionalisation can become a useful mobilising myth (because of its appeal to cultural autonomy and diversity and broadened democracy). But the mere fact of regionalisation cannot guarantee that these values will in fact ensue. Institutional arrangements he argues cannot in themselves be guarantors of freedom and democracy. It is rather the social and political condition of their implementation that matters.

In the transnational context much of the resistance to Community jurisdictional expansion is based on a parallel myth namely that communautarisation is necessarily synonymous with centralisation, loss of diversity and bureaucratic dictatorship. In certain instances this might be the case but it is not necessarily so. In fact in the USA, federal jurisdictional expansion in the field of human rights was promoted precisely because it was thought that, in a certain period federal rather than local standards could better protect democratic values and to an extent the cultural autonomy and dignity of minority groups. Today the situation may be reversed.

In Europe the picture is complex. The changes in the decisional process which are clearly decentralist already suggest that opposition to jurisdictional expansion may as a result have become weakened and, perhaps, less founded. I shall examine these trends in greater detail below. What is important is to understand that it is not inevitable that ^{increased} Community competences ^{the} will lead to an erosion of values of diversity and democracy. That it might have been the case in Canada with the peculiarities of the Quebec position is possible. That it might be the case in Europe today is a matter to be examined dispassionately. Indeed I shall point out some grave dangers in the Community process. But in principle should "Communitarisation" not undermine either autonomy or democratic processes the way must be open to evaluate jurisdictional expansion in any given field in a purely functional way: does Communitarisation improve the potential for attaining the objectives of a given policy or, at least, does it ~~not~~ detract from this potential. Insistence on strict enumeration as a per se value without regard to the "social and political condition of implementation" is as dangerous a myth as the parallel insistence on regionalization.

8. The concept of mutation

To date, much of the legal literature ^{11/} surrounding the doctrine of enumerated powers has concentrated on the material expansion of Community competences. And as the focal point of discussion we usually find the contrasting or complementary doctrine of implied powers -- be it in its judicial form or in its "codified" form in Article 235 EEC. This concentration is understandable. It has the advantage of utilizing a concept (implied powers) well explored in other non-unitary jurisdictions -- both in federal states ^{12/} and, in a muted form, in international organizations ^{13/} -- and is natural, given the very presence of Article 235 and the various judicial pronouncements on implied powers. For the most part the approach of these treatments is broadly similar. First the provisions of the Treaty are analysed with the usual inevitable conclusions that from the legal point of view the Community is a system of attributed rather than inherent powers. Writers differ (often, I suspect, depending on their ideological stance towards the Community) on the measure of latitude for expansion available in the light of the Court's case law on implied power and

on the basis of Article 235. Examination of the practice (political and judicial) is thus usually conducted with the purpose of determining whether any given measure is legally legitimate or otherwise. Whilst I fully accept the utility of these classical legal analyses I find them wanting in three main respects. Firstly there is a tendency to regard the fact of expansion -- especially under Article 235 -- as given. Not enough attention is directed either to the origins of expansion or its dynamics as a process. Secondly, as noted above, there is a tendency in evaluating the issue of expansion to confine such analysis to questions of legal legitimacy. My contention is that in this field we may find developments which are legally legitimate and yet might have profoundly negative consequences by reference to other criteria; equally, legal illegitimacy might stand in the way of pressing political or societal needs and that in this tension we might find clues to changes in the ~~político~~ legal scene.

Finally, even where analysis has gone beyond the strictly legal ~~domain~~ and critically evaluated the changes in the system of enumerated powers by reference to other criteria, this criticism can usually be reduced to one proposition. That wide ranging changes

which avoid the employment of the Treaty amending procedure exclude the participation of national parliaments and are thus undemocratic.

I shall be arguing that this criticism ~~both~~^{both} goes [^]too far and does not go far enough.

My chief concern therefore will be to complement the classic legal analysis (which I shall recount in extreme brevity) by an enquiry which will first try to explain both the origins and the legal-political evolution of the process of change regarding the substantive jurisdiction of the Community and will then try to evaluate the process not only in strict legal terms but also by reference to wider social and political implications. For convenience I propose to call the type of change we are discussing mutation. I use this term to designate developments which have a perceptible effect on the demarcation line and initial balance of competences between the Community and its Member States but which do not occur through formal Treaty amendment. The absence or dearth of mutative developments will indicate a system in which enumerated powers and the initial balance between Member-State and Community are considered in themselves as fundamental. A wide incidence of mutation

will indicate instead a system inclined towards a functional conception of enumerated powers. Thus through this analysis of mutation we may find one of the keys to understanding the Community approach to enumerated powers. This enquiry is not an easy one since in the dynamic system which the Community is, many changes in the balance between Community and Member State are already envisaged in the Treaty itself. We must therefore try and exclude those changes constituting a simple implementation of specific substantive provisions directly traceable to the Treaty or to legislation enacted thereunder. Inevitably there will always be developments which will fall on the borderline between normal evolution and mutative development. But then this fact in itself is already an indication of a certain trend in the Treaty (counterbalanced by others) towards a functional rather than strict orientation towards enumeration. Finally, the search for mutative developments is not an end in itself. The analysis will enable us to observe, from this particular angle, the interplay between law and politics, judicial and political organs, Member States and the Community.

C. The Erosion of Strict Enumeration: Method of Enquiry

The major trend I shall try to illustrate and explain has been one whereby a closed strict approach to enumeration,

has been replaced by an open and functionalist approach and a practice of caution and self limitation has been replaced by extremely wide ranging mutation. In order to understand this trend, especially that of the practice-- which, as we noted may be regarded as paradoxical considering the general deterioration of political supranationality -- I think it is important to distinguish between two basic forms of mutation: internal mutation and external mutation. This very important distinction may best be explained by an example. In the original enumeration, the Community was assigned certain tasks and powers by which to achieve these tasks. Its fields of competence determined by a combination of these tasks and powers were relatively clearly defined. Mutation of this enumeration might occur in two ways. Let us say that the Community is assigned competences in the field of the movement of labour but decidedly not in the field of education. What happens if in the exercise of its powers in the field of the movement of labour the Community encroaches on the field of education which is a domaine réservé of the Member States? According to an

approach of strict enumeration the Community would be allowed to exercise its jurisdiction over the movement of labour only to the extent that it would not encroach on any field reserved to the Member States. By contrast a functional approach would not prohibit —————> ———> such a mutation. The specific permissible end would justify such an encroachment. ^{In any event} the mutation is internal since it does not give the Community original jurisdiction over education in the Member States. It merely allows the Community in the exercise of its given competence in the field of labour movement to encroach on a substantive area of the Member States.

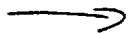
External mutation by contrast is the process whereby the Community gains original substantive jurisdiction (other than by Treaty amendment) over an area in which hitherto it had no competence. Thus an expansion into fields such as environmental protection (not mentioned at all in the Treaty) or consumer protection (only mentioned in passing) or education (currently debated) are examples of external mutation. We shall see that even in relation to external mutation there is a distinction of ends and means but this at a level which is so high as to maintain the distinction between internal and external sufficiently wide. This distinction is not made for mere exegetic purposes. It enables us to analyse with greater

precision and insight the erosion of strict
———> enumerated powers. For an analysis of
developments reveals a subtle interplay between
judicial and political practice.

The Court of Justice over a period of years has
been slowly introducing a liberal and functional
approach to internal mutation. This it has done by
four processes which I have called extension, absorption,
incorporation and implied powers. It has, I shall
later argue, given a cue, a legitimation, even an
encouragement to the political organs, that, for its
part, it had come to reject strict enumeration. When
political conditions, which I shall analyse, were
ripe, the political organs could engage in external
mutation with no sanction by the Court. I have called
this political process expansion. What I propose to
do in the following two chapters is first to analyse
the judicially inspired internal mutation, then to
turn to the political practice of expansion and finally
attempt an overall analysis of the entire process. It
may be useful at this point to outline briefly these
different categories of extension, absorption,
incorporation, implied powers and expansion.

The Typology of Mutation

A strict doctrine of enumerated powers entails
that, unless provided in the Treaty and thus explicitly

agreed upon by the Member States, any changes in the demarcation lines between Member States and Community competences must be effected by a formal amendment of the Treaty. Mutation both internal and external may  take different forms.

Within the Community system the Member States retain, despite their memberships, a variety of functions and areas of competence over which the Community organs have no jurisdiction and which are intended to remain beyond Community reach. At the other end there is an area of Community jurisdiction which is similarly self-contained and which, once again, despite their membership does not involve the Member States directly. A good example might be the rules of judicial review by which the Community Court reviews Community legislation. Another area might be the rules governing labour relations within the organs. (These are not watertight compartments but as an indication of mutually exclusive areas of autonomy this description is, I believe, representative). In the centre between these two ends there is the critical area of overlap wherein the Member States have transferred to the Community the exclusive or concurrent powers to regulate fields that hitherto were governed by each Member State individually.

With this formula in mind we can now set out the different types of mutation.

1. Extension

Extension concerns mutation in the area of autonomous Community jurisdiction. The classical example I shall use to illustrate this form is the well known history of the evolution of a higher law of human rights. Whereas in the Treaty we do not find a codified bill of rights limiting the Community organs and thus restricting the guarantees afforded the individual to protection against material (and procedural) excess of powers by the organs, there now appears to have been added to this area a new level of jurisdiction extending this protection. Mutation in this area touches only the margin of the principle of enumeration since it does not directly encroach upon the jurisdiction of the Member States. At the same time even in this autonomous area mutation represents a change in the status quo which would be contrary to a strict enumeration principle.

2. Absorption

Absorption is a deeper form of mutation. It occurs when, in the course of exercising substantive jurisdiction properly bestowed on the Community, there is an overlap into an area reserved to the Member States. The example I shall use comes from the field of free movement of workers. In order to ensure effective free movement the Community has enacted laws which impinge

on the education policy of the Member States. A strict doctrine of enumerated powers would suggest that the efficacy of the free movement principle should be sacrificed in order not to transgress the jurisdictional divide. Should however such transgression be permitted -- should absorption take place -- we will have indication of a further erosion, going beyond extension, in this strict doctrine.

3. Incorporation

This term is borrowed loosely from the U.S. experience. In the Community system it will invoke a combination of extension and absorption. It will occur if we shall be able to show that the fundamental rights introduced by way of extension may be applied as a standard against Member State action. This will illustrate yet another measure of erosion of enumerated powers.

4. Implied powers - Judicial form

Implied powers are of course a classical form of mutation. Powers hitherto not granted to the Community and its organs will be implied so that by exercising these powers the Community may better execute a policy in an area in which it has jurisdiction. The classical example I shall use is the implication of Treaty making powers and external relation competences so as to enable a better fulfilment of internal policies. The distinction between implied powers and absorption is real even if fine. In the latter we are concerned with a subtle encroachment of Member State jurisdiction in the exercise

of existing Community powers. In the former we are concerned with an actual transfer - sometimes exclusive - of powers to the Community for execution of a policy. Since these developments have been primarily judicially inspired I have referred to them as judicial implied powers.

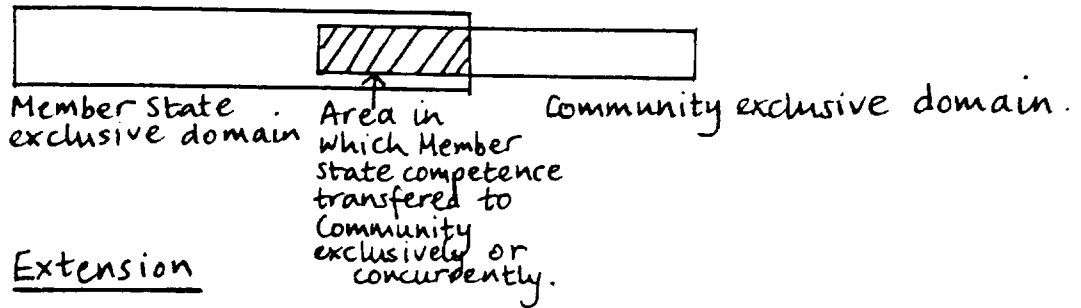
5. Expansion

This is the highest form of mutation involving fully the so-called question of kompetenz - kompetenz. Here we are concerned with the actual substantive jurisdictional expansion of the Community. The usage of and limits to Article 235 EEC —————> will be at the centre of our discussion of expansion. Our focus will be primarily on the political organs whose activities are central in this form of mutation.

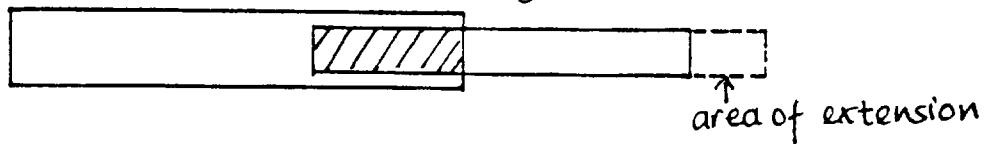
Finally we may also mention other non-organic forms of mutation which occur outside the strict framework of the Treaty but which involve directly the institutions of the Community. The principal illustration here could be the evolution of the Framework for Political Cooperation.

TYPOLGY OF MUTATION

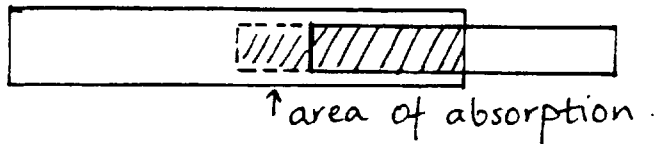
Basic Model



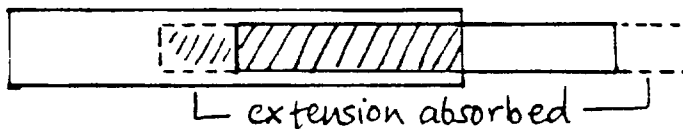
Extension



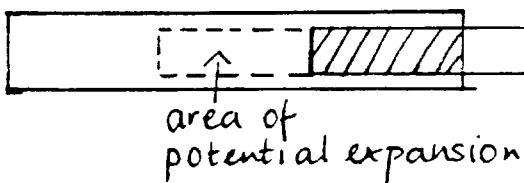
Absorption



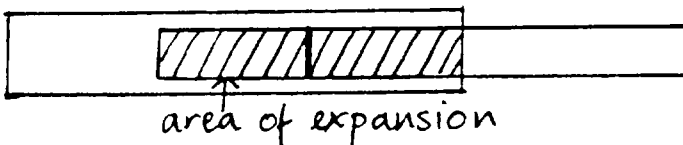
Incorporation



Implied powers by Court



Expansion



Footnotes

1. These two statements cannot and do not reflect the precise constitutional situation in this complex area either in Canada or the USA. In Canada see e.g., Russel v The Queen (1882) 7 App. Cas 829 (P.C.); Attorney General for Ontario v Canada Temperance Federation [1946] A.C. 193 (P.C.); and generally the profound discussion in J.D. Whyte and W.R. Lederman Canadian Constitutional Law (Butterworths, Toronto, 1977) esp at ch. 7. Naturally the new Canadian Constitutional Settlement will render much of this earlier law obsolete. In the USA, see the subtle discussion of Sandalow, The Expansion of Federal Legislative Authority in E. Stein & T. Sandalow (eds.) Courts and Free Markets (Oxford University Press, Oxford, 1982) at 49 ff.
2. The American Constitution in many of its structural clauses is sufficiently open textured to lend itself, even invite, dynamic interpretation. By contrast the Canadian Pre 1982 "constitution" is embodied in a British Act of Parliament, a form of legislation notorious for its resistance to teleology.

3. The Privy Council which, by and large, was the judicial Committee of the House of Lords setting with a different hat did probably regard itself more as a guardian of the integrity of the Act rather than with the welfare of the Canadian Union. (I am not suggesting of course that a less strict interpretation would have furthered the welfare of Canada but rather that the option would be received with less receptiveness).

4. For an analysis of the different forms of enumeration in the national context, see Meny, Regional Policy in the EEC: Integration through Regionalization, Florence Project

See

also MacMahon, Federalism Mature and

Emergent (Doubleday, New York, 1955)

at p.30.

5. Cf. R.H.Lauwaars, Lawfulness and Legal Force
of Community Decisions (Sijthoff, Leiden, 1973).

6. Article 236 EEC. I shall discuss the amending procedure below in Chapter Nine.
7. Wade, Memorandum and evidence on the Amendment of the Constitution of Canada submitted to The Foreign Affairs Committee of the House of Commons in British North America Acts: The Role of Parliament, H.C.P. 42 Vol. II (H.M.S.O., London, 1981) at 102 and 108.
8. Sandalow, note 1 supra at 51.
9. Meny, note 4 supra.

10. Id.

11. E.g. Giardina, The Rule of Law and Implied Powers in the European Communities 1 It.Y.B.I.L. 99 (1975); Olmi, La place de l'article 235 CEE dans le système des attributions de compétence à la Communauté, II Mélanges Fernand Dehousse (F.Nathan/Ed. Labor, Paris/Bruxelles, 1979) 279; Ferrari Bravo & Giardina, Commento all'art. 235 in Quadri, Monaco, Trabucchi (eds.) II Commentario al Trattato Istitutivo della Comunità Economica Europea (Giuffrè, Milano 1965) 1707; H. Smit & P. Herzog (eds.) The Law of the European Economic Community (Matthew Bender, N.Y. 1977) - 269; Marenco, Les Conditions d'application de l'article 235 du Traité CEE 13 R.M.C. 147 (1970). Lesguillons, L'extension des compétences de la CEE par l'article 235 du Traité de Rome, /1974/ A.F.D.I. 375; Schwartz, Article 235 and Law Making Powers in the European Community 27 I.C.L.Q. 614 (1978); Kapteyn & Werloven von Themaat Introduction to the law of the European Communities (Snel & Meunier, Kluwer, London, Dordrecht 1973) 122 ff.; Lauwaars, note 5 supra.

12. Indeed, Sandalow, note 1 supra entitles his discussion : "The theory of Enumerated Powers (Herein of Implied Powers)".
13. See e.g. Roma-Montaldo, International Legal Personality and Implied Powers of International Organizations B.Y.B.I.L. III (1970).
14. There is one noticeable exception - Tizzano, Lo sviluppo delle competenze materiali delle comunità Europee 21 Rivista di Diritto Europeo 139 (1981) who also adopts a processual analysis and is interested in the evolution of the system and not merely in a normative evaluation. Although my analysis differs substantially from that of Tizzano I acknowledge the validity of a contribution of the highest scholarly value.

Chapter Seven

Internal Mutation : Extension, Absorption, Incorporation

In this chapter I shall illustrate the main forms of internal mutation. In relation to each form I shall use one example and analyse the background and techniques involved. We shall have thus three self contained excursions into disparate aspects of Community law dealing not with the general and wide ranging trend ^{but with} specific instances of legal and political interactions. Although I believe in the utility of this micro-analysis it should be remembered that these elaborate examples are only given to illustrate the macro-phenomenon -- the transformation of the system of enumerated powers -- which remains the main subject of Part Two.

4. Extension

The most remarkable illustration of extension is the emergence through judicial activism, of a framework of an unwritten higher law of human rights against which the legislative and administrative activities of Community organs may be reviewed. ^{1/} It is a clear case of mutation since it represents a fundamental development

which affords the individual a novel protection not foreseen in the Treaty. Although dramatic in many ways it is only a mild instance of mutation since, on its face, ^{2/} the effects of this developments on the national legal orders are not direct. The declared purpose of this development is to subject only the legislative and administrative activities of Community political organs to review on the grounds of violation of individual rights. ^{3/} The example is well-suited for our purposes since it brings into play factors such as legal legitimacy, democratic acceptability and system efficiency and involves most actors who participate in the Community process. The interplay of principles and actors may be best displayed by relating the background and evolution of this instance of extension. The tale has featured widely in accounts of the legal order of the Community ^{4/} and sufficient for present purposes will be an analysis emphasising its major aspects.

The Law and Politics of Human Rights in the Community

Neither the Treaty of Paris nor the Treaty of Rome contain a specific list or bill of enumerated fundamental human rights which may serve as a check

on the Community organs and which may provide
—— criteria for judicial review. Traditionally,
resistance to enumerated bills of rights as a higher
law in a legal order is tied to a concomitant
principled resistance to judicial review as such. ^{5/}
This does not however explain the lacunae in the
Community since in both Treaties we find well-developed
systems of judicial review particularly as regards
the activities of Community organs. ^{6/} In the absence
of an authentic "legislative history" of the Treaties ^{7/}
we must try and explain this omission by reference to
the political climate prevailing at the time of their
conclusion and to the original conception of the
Community by its fathers. Inevitably, this analysis
will be speculative. As regards the Coal and Steel
Community several inter-related factors may afford a
plausible explanation to the lack of a bill of rights.
Despite the overt political origin of the venture,
evident both in the Schuman Declaration and the Preamble
to the Treaty of Paris, the Coal and Steel Community
was perceived as confined within limited economic
parameters. The High Authority was given law making
powers but the subjects of this law were conceived as
being primarily large industrial undertakings and the
Member States themselves. The concept of traditional

human rights, particularly, in the immediate post War period seemed to have little bearing on the prospective activities of the Coal and Steel Community.

Thus, there was probably no overt intention to exclude guarantees from the individual. Indeed, it was in that very epoch that the European Convention on Human Rights was adopted, in an exemplary -- unique perhaps -- manifestation of national and governmental self-restraint. Probably the very same sentiments which explain the voluntary association within the ECSC explain the subscription to the ECHR. The two ventures must have seemed however as distinct rather than co-terminus.

The analysis becomes more complicated in relation to the EEC. Here, after all, we find wide ranging expansion of Community activity into fields, albeit economic, where the need for explicit protection of fundamental rights may have been perceived to be more urgent. The Treaty of Rome which contains chapters on social policy, movement of migrants, rights of establishment and the like could hardly have been regarded as coming within a sphere immune to violation of fundamental human rights -- even the traditional ones. Thus, in seeking to discover possible political factors for omission of a bill of rights, excluding the unlikely explanation of mere forgetfulness, we must turn to more nuanced reasoning.

I would first return to the actual provisions of judicial review in the Treaty. It is somewhat surprising that the Treaty, influenced in its judicial and legal provisions by French law embraces such a developed system of judicial review ^{of Regulation} which for long was alien, even anathema to the French tradition. ^{8/} A closer look at these provisions reveals that their purpose was not so much to subject the Community organs to a higher law but rather to guaranty that the Community ^{and its organs,} would not overstep their jurisdictional limits. The system was thus more akin to the Canadian concept of judicial review than to the USA one. The language of these articles, principally Article 173, with the recurring reference to review on the grounds of "infringement of this Treaty" and "misuse of power" and "lack of competence" strongly suggests judicial review the main purpose of which was to make sure that Community organs would not get out of line and act ultra-vires. If that was the spirit of the original system of judicial review it is of little wonder that a bill of rights would not have seemed particularly relevant. ^{9/}

In the political climate prevailing in 1957 at least some of the Member States were fearful of any expansion in the powers to be granted to the Community

central organs. In ratifying the Treaty of Rome, the Member States, no longer pure and virginal as in the immediate post-war era, were committing themselves to an unprecedented experiment in contemporary international history. But why then was a bill of rights excluded? Why not curtail even further the liberty of Community organs? Paradoxical as it may sound the fear might have existed that the very listing of rights which must not be encroached upon may become an invitation to extend powers and competences granted to the limits of those rights. This argument is not as fanciful as it may at first seem. We find^a a clear analogue in the legislative history, and the interpretation thereof, of the introduction of a Bill of Rights into the American Constitution. In trying to interpret the reason for enacting the delphic Ninth Amendment ^{10/} several Supreme Court Justices as well as Founding Fathers ^{11/} have pointed out, in the words of Ely, that the danger existed that "... the inclusion of a bill of rights in the Constitution would be taken to imply that federal power was not in fact limited to /those granted by the Constitution/, that instead it extended all the way up to the edge of the rights stated in /the newly introduced bill of rights/." ^{12/} With the available models of human right bills so closely

associated with inherent state power rather than with limited, enumerated competences, could it not also be that national concern was to limit jurisdictional expansion of the newly created EEC? Especially when the creation of social and economic charter was even more speculative at that period than it is today?

We might find an even more deep-rooted explanation to the omission -- one that touches on the very architecture of the Community legal order. We are today already habituated to thinking of the Community as the fully fledged constitutional order to which it has by now developed. In 1957 neither the doctrine of direct effect nor the doctrine of supremacy had emerged. If they were nascent in the Treaty, as the Court later claimed, they were certainly very well hidden and as we saw in earlier chapters, introduction of these concepts involved a series of daring acts of judicial activism. The simple fact remains that in 1957 the protection of the individual from Community measures allegedly violative of his or her fundamental rights would seem to rest within the national orders. The yardstick for violation would be assumed to exist within the municipal protection afforded the individual in the Member States'

constitutional orders (of which the ECHR was one). A Community measure coming into conflict with such national guarantees would be subordinated to the latter. An individual could either simply refuse to comply with an allegedly violative Community measure and have as a valid defence the infringement by that measure of standards accepted in his or her national order. Or, at worst, the Member State concerned could enact a national act abrogating the Community offensive measure.

Finally there is simple but plausible explanation that post War socio-economic diversity had developed to such an extent that the exercise of reaching a consensus on a common bill of (socio-economic) rights already seemed impossible. Perhaps it was better to leave such an emotive issue outside the Treaty rather than risk national parliamentary opposition at the ratification stage.

It is to the Court then that we must turn to understand the eventual mutation. The landmarks of this judicial itinerary are among the most famous in the contemporary history of European legal integration. In Stork ^{13/} and Geitling ^{14/} decided in 1958 and 1959 the judges (but not, interestingly, the prophetic Advocate General Lagrange ^{15/}) rejected an invitation to review and censure a Community measure allegedly violating a basic right recognized in one or other of the Member States. Several reasons may explain the Court's reticence at that time. The material context of these cases -- and, inevitably the outlook of the Court -- was within the narrow economic sphere

of the ECSC. To break into the emotive language of human rights and higher law might have seemed somewhat incongruous.

But, the issue is not merely semantical. Unlike the Treaty of Rome, the Treaty of Paris was much less of a *Traité Cadre*: The scope for teleological

interpretation would appear to be more limited if respect for judicial propriety was to be maintained.

The reasons go even deeper. The fusion of the Community and national legal orders was limited and fragile. At that time the ECSC was perceived by the Court as an autonomous entity. Its task was to

protect that separation and to defend the High Authority's independence. Whereas later, in the EEC, the main threat to the independence of the Commission clearly seemed to come from its sister Community organ, the Council of Ministers, in the Stork situation the major threat as perceived

by the Court would arise if the High Authority would be obliged to look over its shoulders at each step and to ensure that it was not infringing constitutional guarantees in the Member States. The Court would not lend its authority to such a construction. The oft quoted passage from Stork ^{16/} clearly affirms these notions of separation and autonomy. It should not be forgotten that in the absence of clearly established doctrine of supremacy, there would be little to stop the challenge from moving from national constitutional law to any national norms. (In fact in the Stork decision one finds the first indication of the subsequent supremacy decisions). Finally it was not only the Court's perception of the Community order

which was reflected in that early jurisprudence. It

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was a reflection of its own self-perception:
Jurisprudence from a similar period ^{17/} suggests
a self-image evocative of traditional international
tribunals. The Court's self-limiting -- not to
say self-deprecating -- characterization of itself
in Stork is thus a reflection in the area of human
rights of the international phase in Community development.

Ten years later we find the same Court ^{18/}
speaking a different language. Faced with a similar
material dilemma of an individual challenge to
Community law based on the grounds of violation of
fundamental human rights, the Court affirmed not
only that fundamental rights did form part of those
legal interests which the Court could and would
protect, but also that the source of these rights
may be found within the very constitutional legal
orders of the Member States including international
treaties (notably the ECHR) which hitherto were
considered irrelevant. The technique by which they
were to be ascertained was a comparative method of
distillation of those principles and rights into a
homogenous Community concept. ^{19/}

The fact of mutation is clear enough. A new
legal super-structure (though I still have doubts
about its contents ^{20/}) had been added to the judicial

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protection afforded in the Community. It is in this sense that we may speak of extension. The extension does not directly affect the Member State domain. But, then, the indirect effect is not insignificant. If the structure is filled with content and does not remain as a judicial platitude, it could be regarded as a new check on the powers of the governments of the Member States acting qua Community Council of Ministers. Even more indirectly, but no less profoundly, if the Court's jurisprudence is accepted, (and this, it is submitted, will depend on the content which the Court puts into the structure) it will remove national judicial claims to residual control of Community legislation.

Our concern however is not to explain the level of new protection afforded and the evolving substantive rights distilled by the Court but rather to outline and evaluate the factors which prompted this type of mutation. For it was not only the system which mutated; it was the very Court and its perception of the Community order which had mutated as well.

Whence the legitimacy of the Court to subject activity of the legislative Community branch to review on the basis of an unwritten higher law? On its face

this situation conjures up the classical conundrum of the Gouvernement des juges. In the Community context however this classical conflict is largely fallacious. For as we have noted in earlier chapters, the legislative process of the Community with the limited involvement of Parliamentarians and the increasing —————> power of civil servants in the shape of the COREPER coupled with the dominance of the executive who are only notionally controllable by their national chambers, is a far cry from a representative democratic process. If the new jurisprudence of the Court represents a gouvernement des juges it is designed to control a gouvernement des fonctionnaires.

↙
So we have here —————> one clue which explains the transformation of the Court's attitude since the days of Stork. The absence of a written bill of rights coupled with a decline in the accountability of the Community and the emergence of the "democratic deficit" can on this construction both the motive of the Court and explain why the classic objection to this type of

judicial activism is less applicable in the Community situation. The phenomenon which is often characterized as the antithesis of the principle of majoritarian decision making fails in the Community context since the process is hardly majoritarian.

As to the legal basis for the Court's decision

_____ > the concept of "general principles of law" in a Traité Cadre is probably wide enough to lend itself to such an interpretation, although _____ >

the actual viability of transforming the theory of comparative distillation into a meaningful reality of substantive rights is more questionable. There can be other factors which explain this act of extension.

The ambit of operation of the EEC is perceptibly wider than the ECSC. The language of human rights, in a functional situation such as Stauder ^{21/} does not seem so incongruous. Likewise, the Treaty of Rome is to itself conducive the type of judicial comparative technique evoked as a solution to the source of human rights. Article 215 EEC, to give the clearest example, explicitly refers to the comparative method and to the national legal orders as a source of law. On its face then the objections seem resolved. But the justification of judicial extension as an attempt to

close the democratic deficit constitutes only part
-- ^{perhaps} not even a major part -- of the explanation. It
may even be a rationalization. The prime motivation
for judicial extension was not, I believe, a benevolent
interest in human rights nor even in the democratic
structure of the Community. At the source of the
mutation one finds the same protective sentiment which
induced the Court to reject the fundamental right
initiative ten years earlier. The difference is that
in the new constitutional configuration of the
Community -- a configuration to the evolution of which
the Court itself had contributed -- the expedient reply
to the same dilemma was affirmative rather than negative.
For, as we know, in the intervening years, the Court
had developed the normative structure of the Community
in the centre of which rests the concept of supremacy.
In its own self-perception another profound metamorphosis
had taken place. No longer did it see itself as an
international tribunal determined to preserve the
autonomy of the system over which it was charged, but
rather a constitutional Court of a supranational order
determined to preserve the integrity and unity of the
system it had evolved. The "surface language" of the
Court in Stauder and its progeny is the language of

human rights. The "deep structure" is all about supremacy. For the writing, ^{later} scratched by the German and Italian Constitutional Courts, was clearly visible on the wall and threatening the concept of supremacy of the Community legal order and its judicial organ -- the Court. Stauder, Nold and Internationale Handelgesellschaft become thus, in the political circumstances of the late 60s and early 70s an inevitable sequel to Van Gend en Loos, Costa v ENEL and their progeny: An attempt to protect the concept of supremacy. Under this light the Court's reiterated statements in favour of human rights must be treated with more caution. Be that as it may the Court's act of extensions does call at least as regards some Member States for a

removal

of guarantees at the national level. If fears are to be allayed, the Court will have to demonstrate that it is willing to use the new mutated power to annul measures backed by the concerted will of the Council of Minister. To be sure it had done so on many occasions on criteria lesser than violation of human rights. And the Council of 80s is not the fragile High Authority of the 60s. But here lies, it is submitted, the unresolved legitimacy issue regarding this particular

instance of mutation. ^{it is true that,} If the Court developed its human rights doctrine to protect the integrity of the order rather than the individual, will it in a case pitching on the one hand human rights and on the other hand an important Community policy be ready to prefer the individual to the Community? For in the Community ^{the main issue} is not the traditional question of ^{and} legitimacy of an unelected unaccountable court boldly exercising its judicial power to thwart the policy of accountable politicians. The querelle is not between judge and politician but rather between judge and judge. For if I was correct in suggesting that the spirit of Stork still hovers over the recent jurisprudence of human rights; if the "deep structure" of this new jurisprudence is one of Supremacy rather than Human Rights; if the Court's commitment to the integrity of the system is at the basis of these new developments, one may first wonder whether justice may be seen to be done -- in the type of conflict stipulated above -- when the adjudicator is so committed so as to suggest a judgment in re sua. And secondly, one may wonder, and there are indications in the Court's jurisprudence that this question is not entirely theoretical, whether justice will in fact be done.

One cannot conclude this analysis without allusions to a final illustration of the interaction between the various political actors among which we must clearly, for present purposes, include the Court. In 1979 the Commission proposed the accession of the Community to the ECHR. Various interpretations have been put on this suggestion and its merits which need not concern us here. It would appear that the prospects for implementation are, for the time being, slight. One effect of the proposal would be the imposition of the European Court of Human Rights as a higher instance above the European Court of Justice in matters concerning the adjudication of allegedly violative Community measures. The Court, by its very position, had no way of commenting fully and openly on this suggestion. But in its judicial activity since publication of the Memorandum of the Commission it has striven to show its superiority as an adjudicator vis-à-vis the Court in Strasbourg. ^{22/} Thus, although there was not explicit criticism of the Court in the Memorandum of the Commission, it will indeed have had a positive effect if it induces the Court to put more substance into the framework it has created.

The human rights issue, to which I shall return in the discussion of incorporation, is an interesting example of extension. My analysis helped explain its

_____, background and ^{the} forces which influenced this development. But do not let us forget the *raison d'être* of this analysis: the new self perception of the Court did not only enable it to shift its orientation vis-à-vis the human rights issue. It also involved a strong indication that the principles of enumerated powers would not constitute an obstacle to mutation at least not in this limited category of extension.

3. Absorption

Absorption occurs when in the legislative or administrative exercise of jurisdiction already bestowed on the Community there is an impingement, often unintentional, on national policy or national rules, hitherto considered outside Community reach. A strict policy of enumerated powers would suggest that such impingement should be prohibited and in any event constitute a ground for annulment of the measure in question by the Court. As we shall see the Court has in certain cases sanctioned or even encouraged such absorption. Whereas extension concerns a mutation of the Community system which has only indirect effect on the national order, absorption is concerned directly with the overlap of jurisdictions:

The Community system absorbs a national rule so as to give efficiency to a Community policy. Our analysis, in Part One of this study, of the constitutionalization of the Treaty is the most dramatic example of system absorption since ^{present} within this horizontal framework of analysis, each Community principle established by the Court such as supremacy, direct effect and the like, may be regarded as an absorption of the national rules governing relations between states and international organizations to which they belong. The system was mutated by absorption of those rules into the Community order. We need not spend much time treating this system mutation. Our earlier discussion of the evolution of normative supranationalism and the decline of decisional supranationalism may be taken, under this ^{perspective} as a large scale analysis of the various legal-political dimensions of "system absorption". Rather I propose to deal here with an ^{of absorption} illustration in an area of substantive law. The illustration, surely not unique, is taken from the field of free movement of workers.

The Case of Donato Casagrande: ^{23/}substantive absorption
illustrated

Alongside defence, foreign "high politics" and some principal aspects of fiscal and monetary policy, education is one of the major areas of national policy over which the Treaty ^{has} granted the Community virtually explicit ~~no~~ jurisdiction. ^{24/} Donato Casagrande, an Italian national, son of Italian migrant workers lived all his life in Munich. He was, in 1971-2 a pupil at the German Fridtjof-Nansen-Realschule. The Bavarian law on educational grants (BayAföG) ^{25/} entitles children who satisfy a means test to receive a monthly educational grant from the Länder. The city of Munich refused his application for a grant relying on Article 3 of the same educational law which excluded from entitlement all non-German aliens except stateless people and aliens residing under a right of asylum. ^{26/}

Casagrande, in an action seeking a declaration of nullity of the educational law, relied principally on Article 12 of Council Regulation 1612/68. ^{27/} The Article provides that "... the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory." Further, the Member

States must encourage "... all efforts to enable such children to attend these courses under the best possible conditions."

The Bayerisches Verwaltungsgericht -- in an exemplary understanding of the review role of the European Court of Justice -- sought a preliminary ruling on the compatibility of the Bavarian educational provision with Article 12 of the Council Regulation. The issue of powers and mutation is best illustrated by the submission of the Bavarian Public Prosecutor's Office (Staatsanwaltschaft) which intervened in the case. 28/

The Council, it was submitted, exceeded its powers under Articles 48 and 49 EEC. These Articles are concerned with the conditions of workers. "Since individual educational grants come under the sphere of educational policy [in respect of which the Council has no jurisdiction] ... it is to be inferred that the worker can claim the benefit of assimilation with nationals [as provided in Article 12] only as regards social benefits which have a direct relation with the conditions of work itself and with the family stay" 29/ Article 12 of the Regulation must under this view be read as entitling children of migrants to be admitted under the same conditions but not to receive educational

grants. ^{30/} The Bavarian public prosecutor thus denied, at his strongest, the very possibility of a conflict between Article 12 and the Bavarian BayAfög since it could simply not apply to educational grants;^{31/} At its weakest he was pleading for a narrow interpretation of the provision of Article 12 because of the jurisdictional issue. Underlying this submission was the deeper ground that if education is outside the Community competence then the Regulation itself transgresses the demarcation line and the interpretation sought by Casagrande could not stand in any event.

This was not the first case of its kind to come before the Court. ^{32/} How then was the Court to deal with the question? One can detect two phases in the process of judicial consideration. The first phase consists of an interpretation of the specific Community provision in an effort to understand its full scope. We shall return later to the particular method of interpretation adopted. It is important to notice that whilst engaging in this phase the Court acts as if in an empty jurisdictional space with no limitations on the reach of Community law. It will come as no surprise to learn that its rendering of Regulation 12 lead it to the conclusion that the Article ^{did} cover the distribution of grants.
^

In the second phase ^{33/} of analysis the Court addressed the jurisdictional-mutation problem. We must remember that the primary ground for illegality of a measure -- infringement of the Treaty -- certainly covers jurisdictional incompetence. This was already established in the Courts earliest jurisprudence. ^{34/} The Court first acknowledged that "... educational and training policy is not as such included in the spheres which the Treaty had entrusted to the Community institutions." ^{35/} It is important to note the allusion to the Community institutions: the case after all deals with an issue of "secondary legislation" enacted by the political organs. But, in the key phrase, (not an example of lucidity) the Court continues "... it does not follow that the exercise of powers transferred to the Community /enlarging thus the language from Community institutions to the Community as a whole and hence from secondary legislation to the entire Treaty/ is in some way limited if it is of such a nature as to affect /national/ measures taken in the execution of a policy such as that of education and training. ^{36/} It is now that we understand the importance of the two-phase judicial analysis.

In phase one the Court explains the meaning of a Community measure. The interpretation may be teleological but not ^{necessarily} to the degree which the Court performed in relation to the evolution of the higher law of human rights. Absorption is in this way distinguishable from extension. In the second phase, the Court states that to the extent that national measures -- even in areas over which the Community has no competence -- conflict with the Community rule as elaborated in phase one, these national measures will be absorbed and subsumed by the Community measure. This is truly ingenious. It is not -- says the Court -- the Community policy which is encroaching on national educational policy. It is the national educational policy which is impinging on Community free movement policy and thus must give way. It is, once more, important to note the limitation of absorption. It extends the effects of Community policy and rules into an area ostensibly outside Community jurisdiction. It does not -- unlike, say expansion (Art. 235 EEC) -- give the Community direct jurisdiction over the area with the power to legislate in the educational field as such.

This distinction should not diminish from the fundamental importance of absorption and its inclusion as an important form of mutation. This can be gauged by trying to imagine the consequences of a judicial policy which would deny this possibility of absorption. The scope for effective execution of policy over which the Community had direct jurisdiction would, in a society in which it is impossible to draw neat demarcation lines between areas of social and economic policy, be significantly curtailed; but at the same time there is a clear sacrifice and erosion of the principle of enumeration. And, of course, it invokes a clear preference for the Community competence rather than the state competence. In a sense the language of the Court suggests a simple application of the principle of supremacy. But this is not a classical case of supremacy. After all in relation to issues of jurisdiction of government supremacy may only mean that each level is supreme in the fields assigned to it. Here we have a case of conflict of competences. The Court is suggesting that in such conflicts the Community competence must prevail. This is probably the doctrinal crux of absorption.

I suggested earlier that the major constitutionalising cases may be regarded as instances of absorption in this context. Though the argument is abstract and complex it is important since we can see here one instance of the crossing of the vertical and horizontal dimensions of the Community system. The distinction between the two phases of judicial analysis is of importance here as well. In relation to substantive absorption such as Casagrande the distinction was explicit. In the major cases of system absorption such as Costa v. ENEL and Van Gend en Loos the two steps also exist although, unlike Casagrande, the dividing line is not so clear. In the first phase the Court, on the basis of provisions in the Treaty (even if interpreted in a teleological way) will construe (to borrow from the language of Hart) a Community "tertiary rule" of, say, direct effect of supremacy. ^{37/} In the second phase -- while remembering that the division is methodological, in fact the two processes are part and parcel of the same analytical process -- it will absorb or subsume the national jurisdictional rule in question. By analogy to Casagrande the Court will be saying that to the extent that national law of foreign relations exist they cannot prevent an obstacle to the operation

of the Community law. Naturally in relation to "tertiary" system rules the process is more abstract but this does not destroy the similarity. Thus, as in the case of substantive absorption, the fact that the Community absorbs an area of the national rules of public international law and constitutional law does not give the Community direct and full jurisdiction over that area. No more than the Community by virtue of Casagrande can enter directly into the educational field, can it by virtue of, say, Van Gand en Loos, legislate for the national system as regards its general rules on the relationship between international law and national law. At the same time, as in Casagrande where the fact that the Community was not accorded specific competence in the field of education did not per se prevent exercise of Community powers in an area where there was competence to invade that field and absorb certain national rules, so, in relation to the more abstract "tertiary rules" and the field of constitutional law, the fact that the Community was not accorded specific competence in that "field" did not prohibit its own rules, as interpreted by the Court, invading the national field and taking effect there.

It is at this point that . . . detection of the two phases becomes important in the context of interpretative theory and legal legitimacy (perhaps even in a manner which extends beyond the specific issue of absorption) since different criteria will apply to the evaluation of the two distinct judicial acts.

As regards the first phase, the judicial act consists in finding out, as in our example, what is the meaning to be given to Article 12 of the Regulations on migrant workers,^(or) in relation to system mutation, in finding out what "tertiary rules" may be deduced from the Treaty.

For this process the Court relies on the variety of interpretative techniques familiar in general constitutional law. 38/

The legitimacy of this judicial activity will be tested^{by} and will depend on the integrity and the skill by which this process is executed by the Court. One may cavil at this or that result but not at the process of interpretation itself. A systematic and coherent interpretation by the Court is -- and there can be no other -- the only reply to all charges of legal, democratic and functional abuse.

The unease that is felt towards the judicial encouragement of absorption may -- if the two phase analysis is used -- be directed at the second phase of judicial activity where the Court, having ascertained the putative scope of Community law proceeds to legitimate the absorption.

Thus in Casagrande, as we saw, the Court states in its judgement that "although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited..." if it encroaches on national educational policy.

But one may ask of course whether it would not be just as plausible, if unwelcome to those favouring greater integration, to suggest that in a system of enumerated powers such an encroachment would be contrary to a cardinal principle of the entire system? Indeed, as we noted, in a not entirely unsimilar situation a Canadian provision was interpreted in this restricted manner. ^{39/} In fact it is precisely at this point in the judgement that the Court implicitly makes its choice and elects for an enumerated principle which is functional rather than strict. I have insisted in this context on the distinction between the two phases of judicial activity because it enables us to identify

the judicial leap and see it for what it is: a policy choice. This is important since it demonstrates that the innovation of the Court in many of its radical decisions was not only in the use of constitutional interpretative techniques to ascertain the scope of the Treaty but also in a jurisdictional leap as regards the question of competences.

Identifying the leap puts the issue in its starkest form. It does not however necessarily lead to condemnation. From the strict point of view of legality the problem is unanswerable. The first phase of the judicial decision, in each instance where absorption is to take place, often leads the Court to the conclusions that as a matter of principle the Treaty calls for jurisdictional encroachment. This then is posed against the principle of strict enumeration. One way or another the Court must take a stand. We may be happy or unhappy with the result depending on our attitude to the supranational enterprise but if, as I shall argue below, even the empirical premise of strict enumeration might be questioned, then the legality of the Court's leap might not be unacceptable even by the jurists. To the extent that there is a choice involved it is not altogether surprising that the European Court of

Justice in accordance with its integrationist ethos chooses more often than not to absorb as it is not altogether surprising to have found the Privy Council going the other way in the Canadian context. What is important is to recognize that the judicial-political leap will draw reactions from, and have consequence for the other political organs and the general architecture of the Community system. *These I shall examine in chapter nine.*

C. Incorporation

The term incorporation is borrowed from the constitutional and juridical history of American Federalism. The first Ten Amendments to the United States Constitution ^{40/} are traditionally referred to as the Bill of Rights. For a long period the provisions of the Bill were considered as constituting a limitation on the federal government and having no direct application to the individual states each of which had its own constitution embodying some form of individual protection. ^{41/} By contrast, the celebrated Fourteenth Amendment ^{42/}, which was introduced in the wake of the Civil War, was directed specifically at state jurisdiction. Section One, which is of the greatest significance, proscribes the states from abridging the privileges or immunities of citizens of the United States, prohibits deprivation of life

liberty or property without due process of law and forbids a denial to any person within the state of the equal protection of the Laws. It will not be surprising that the broad, principled, language of this section has made it a fountain for constitutional dispute and constitutional adjudication. In a process, the first major landmark of which is usually traced back to 1925 ^{43/}, the Supreme Court has "incorporated" substantive rights and limitations enumerated in the federal Bill of Rights and applicable on their face to the federal government alone, into the Fourteenth Amendment. The rights and limitations thus incorporated became thereby applicable at state level. The effect has been to curb legislative and administrative practice hitherto limited only by state constitutional and adjudicatory norms, if they contradicted federal, constitutional and adjudicatory norms. It is important, for comparative reasons, to note that incorporation of federal rights, at least theoretically, serves as a lowest common denominator and, where the nature of the right in question permits, does not prevent the adoption of higher state standard of protection ^{44/}. The process has had several quarters opponents from judicial, political and academic. Among supporters, even within the Court, there has been a

measure of diversity as regards the interpretative analysis adopted to explain the process. Likewise there have been debates about the utility and merits of incorporation, in terms of the level of protection afforded to the individual ^{45/}. There can be no dispute however that incorporation represents an extraordinary form of mutation even in the flexible American system.

The possibility of incorporation within the Community system appears at first sight improbable. We noted that the Treaty contains no explicit bill of rights, so that Community incorporation would entail not one but two acts of high judicial activism. First the creation of judge made higher law for the Community and then its application to acts of the Member States. But this very fact suggests that incorporation may not, after all, be so inconceivable. For it invokes no more than a combination, in the field of human rights, of extension and absorption. The frequency and regularity by which these two other forms of Community mutation are exercised might suggest that incorporation is not only possible but perhaps even likely to occur -- albeit in a form which is not on all fours with the American counterpart. The

necessity to fuse the two other mutative forms might suggest that incorporation will "creep in" rather than arrive with a bang. In fact there are indications that this process has already begun ^{46/}. In the process of incorporation we should be able to identify two anchors. One provides the means for definition and elaboration of the human rights at the federal level. The second concerns the mechanism for their projection into state jurisdiction. In the American system these two anchors rest securely within the constitutional framework: the Bill of Rights and the Fourteenth Amendment respectively. This is clearly advantageous. Not only does the Supreme Court have an unassailable authority to engage in a human rights jurisprudence (an activity which in Europe necessitated in itself an act of extension); but also, the fully-fledged federal system with its autonomous criminal and civil jurisdictions provides a fertile ground in which human rights norms may be "tested" before their projection into the State systems ^{47/}. The only difficulty, not an inconsiderable one, is in the act of incorporation itself.

In the Community system the first anchor is far less secure. As we saw, the evolution of

Community human rights is far from a simple operation. To date the Court has identified several sources for the elaboration of its own norms. Some rights are directly traceable to the Treaty itself.^{48/} Another source may be the constitutional tradition of the Member States ^{49/}. Yet another source may be the international treaties in which Member States have collaborated or to which they are signatories and principally the European Convention on Human Rights ^{50/}. The inclusion of this latter Treaty is significant since it gives the Court a much more concrete source -- more akin to the American Bill of Rights -- on which to build its own normative basis. And yet this apparent abundance of sources serves to complicate rather than facilitate the actual process of distillation. Thus the Court has spoken of Constitutional traditions common to the Member States. Often, with the help of comparative analysis, it has been possible to find commonality in apparently diverging traditions ^{51/}. But this may not always be possible ^{52/}. Likewise, although the European Convention does not provide a coherent text, by virtue of different regimes of reservations not

all Member States are subject to the same substantive obligations, and the domestic application of the Convention differs from one group of states to another ^{53/}. In any event the Convention can only serve as a lowest common denominator ~~and~~ a source for Community rights ^{54/}. The elaboration of actual principles is thus likely to demand an intricate exercise of comparative jurisprudence which might lead to national resistance when it has to be given effect in the Member States' legal orders.

It is here that we have the clue to the different purpose and effect of extension and incorporation of human rights in the context of the supranational system. The two forms of mutation derive from different juridical-political exigencies. In the case of extension we noted that the deep-rooted push for mutation was the challenge posed by Member State legal systems (Germany, Italy) wherein fundamental human rights were enshrined in the national constitutional order. The European Court, concerned that the criteria for review of Community acts would remain integral and within the supranational order, responded to the challenge by evolving its own doctrine. Neither the German Court ^{55/} nor even the Italian Court were fully placated by this new jurisprudence. The reasons for this are clear. For its part the

European Court could not accept that in every case it would adopt as its review criterion the highest norm existing in the Member States. Not only is there a theoretical difficulty, in relation to some rights, of identifying "the highest norm", but also this would reverse the doctrine of supremacy and uniformity by giving each Member State, at least on the constitutional level, the ability to dictate its constitutional norms to the Community as a whole. For their part the supreme national courts retained their fear that the compromising European criterion ^{56/} would enable the enactment of a European Community law (or sanction European administrative practice) which would be contrary or fall beneath the standard of protection afforded in the national legal system. Shed of all trimmings the fear is that the European higher law will not be high enough.

By contrast, should a process of incorporation occur, resistance to it is likely to spring from an opposite sentiment. The application of a Community criterion of individual protection to state practice -- which would be the essence of incorporation -- is not likely to be problematic in those instances where the Member State protection would be of a similar or higher level. This is also the experience of the

American practice ^{57/}. The main effect and resistance is likely to be in situations where the national standard is lower (or different) by comparison to the supranational norm and the consequence of Community standard would be to invalidate the national practice.

It may be useful at this point to look at one decided case which ^{has} come close to this notion of incorporation. It will also illustrate the limitation and crucial distinguishing mark between potential European incorporation and its counterpart in fully-fledged federal systems. Roland Rutili ^{58/}, an Italian national was, on account of his trade-union activity, barred by the French authorities from residing in four 'départments' one of which was his previous habitual residence. He appealed against this prohibition claiming inter alia that it was at variance with the guarantees afforded him under the free movement of workers regime of the Community. There was no dispute that his status was such as to afford him that protection. The French authorities relied naturally enough on the reservation to that regime which, as elaborated in the Treaty ^{59/} and in "secondary legislation" ^{60/}, allows exception to the positive rule when justified on grounds of public policy (ordre public). A reference was made to the European Court. One issue which the →

European Court had to answer concerned the conditions under which a limitation on the free movement regime would be justified on grounds of public policy. This necessarily involved a definition of the breadth of the concept of public policy.

Although the Court first confirmed that the Member States were "... in principle, free to determine the requirement of public policy in the light of their national needs" ^{61/}, this determination would be subject to Community control. Community control could of course derive from the substantive requirements of Community law itself. Thus Directive 64/221 imposes inter alia an imperative of considering the individual circumstances of the migrant. France would not be allowed to exclude or restrict movements of say non French chess players merely because they were, as a class, unpopular in certain areas. ^{61a} Likewise the directive prohibits economic ends as a permissible factor in the determination of public policy. Thus high unemployment in a French 'département' would not be sufficient for Community migrant workers, with no work, to be expelled or restricted ^{62/}.

Apart from these specific detailed requirements of Community law which limit the freedom of the Member States to determine the scope of public policy as a ground for restricting the freedoms of the Community migrant worker there are general explicit provisions in the Treaty which have a similar effect. Most important is the principle of non-discrimination on grounds of nationality articulated in Article 7 EEC. Thus even if the definition of French public policy had not been at variance with specific provisions of Community law some of which I outlined above it could still fall foul of the Treaty regime if it involved a non-authorized discrimination between French nationals and Community migrants ^{63/}. Up to this point the control of the national law and practice would involve no more than a straight application of Community law.

But what would be the situation if the state concept of public policy did not violate specific detailed provisions of Community law nor discriminate between nationals and non-nationals. In other words, if the national system permitted -- in respect of Frenchmen and foreigners alike -- practices which explicit positive while not violating Community law could appear to be in violation of fundamental human rights ^{64/}. It

would seem that under these conditions the Community could not afford legal protection. Or could it?

We may safely assume that if the Community secondary legislation, determining the specific detailed Community concept of public policy, came into conflict with fundamental human rights, these Community provisions would be reviewable by the European Court of Justice in relation to the three sources which we discussed above. The Court would attempt to distil an applicable norm of higher law and review the allegedly offending Community legislation in accordance. This would be the effect of extension. But could this higher law so distilled also become a source for adjudicating a non-discriminating national concept which did not violate the specific provisions of secondary Community law? Could incorporation take place? In what for our purposes must be the key Recital in its judgment ^{65/}, the Court seemed to be edging towards giving a positive reply to this question.

Having earlier in its judgment asserted that the determination by Member States of public policy was subject to Community control it then expanded on the explicit provisions of Community law on the

subject, both general and specific, and in fact found that the French practice violated these. But then, admittedly obiter, the Court went on to suggest, in language virtually identical to the extension cases, that the specific detailed rules of Community secondary legislation limiting the power of the Member States to control aliens (by devices such as public policy) were not exhaustive. They were a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all Member States, and in Article 2 of Protocol no. 4 of the same Convention, signed in Strasbourg on 16 september 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those rights 'in a democratic society'.

If the Community regulation and directives are but a specific manifestation of a general principle it would follow that the general principle forms part of the Community regime which controls the practices of the Member States. It further follows, that a national practice which violated this general principle

(of which detailed Community provisions were but a specific manifestation) even if applied to nationals and migrants alike, would be violative of Community law and, by virtue of the principle of supremacy, inapplicable. The Community higher law would have absorbed the corresponding lower national protection. Incorporation would occur. This aspect of the decision is of course obiter and yet to be followed in a concrete situation. Although the point has since been argued in several cases ^{66/}, it has not been necessary for the Court to decide whether it would follow its jurisprudence in Rutili. ^{67/}

What would be the impact of this policy if it were followed? In Rutili the Court mentioned as its normative source the European Convention and its Fourth Protocol emphasizing that all Member States were parties to it. Does not this diminish the potential importance of European incorporation by comparison to the American doctrine? Certainly, there is less scope for an entirely independent jurisprudence by the Court of Justice. However, should incorporation develop its impact might become not insignificant. In the first place, so far as the European Convention is concerned, although all Member States are signatories the reservation regime varies from one to another. Likewise, in relation to the

very Protocol which the Court mentioned Britain, Italy and the Netherlands have to date failed to ratify it. Even more dramatic would be the consequence in respect of Britain, Denmark and Ireland where traditionally the Convention does not form part of the law of the land but which if incorporated by the European Court would have to be enforced by the national courts 68/.

Secondly, mindful that in its recent jurisprudence the Court clearly designated the ECHR as a minimum standard which did not exhaust the sources of protection of the Community individual 69/, one can imagine even farther-reaching implications. For if in its comparative distillation the Court adopted a "high standard" from the tradition in some Member States, this, by virtue of, incorporation, would be transported into all other national legal orders. Moreover, should incorporation occur the change would not only be substantive but procedural as well. Decentralised judicial review of legislation exists in only a few of the Member States of the Community 70/. The process of incorporation coupled with the systems of compliance operative under Article 177 EEC would introduce Community style decentralised review in the sphere of human rights to each of the ten partners.

It is in Rutili however that we also find the jurisdictional limitation on potential Community incorporation which crucially differentiates it from the American version. We must turn here to the second anchor of the process -- that which allows the transnational rights to be projected into the state systems. In the US any constitutionally protected fundamental right directed at the states applies to any state administrative and legislative practice regardless of the division of powers between the federal and state legislatures. Thus, these rights in the first Ten Amendments once incorporated into the Fourteenth Amendment are projected in an all-encompassing constitutional jurisdiction.

By contrast, in the Community even the widest Treaty anchors do not, as yet, have this effect. In this context, the Court of Justice has been rigorous in respecting the jurisdictional divisions of power between the Community and its Member States. Non-discrimination on grounds of nationality was accepted, thus, by the Court as a "general prohibition", but, faithful to the language of Article 7, only "... within the field of application of the Treaty" ^{71/}. In

Rutili this would mean that the protection afforded the Community worker could not be projected onto Community citizens not qualifying as "workers" in the Community sense of the word and certainly not to non-Community migrants. In one of the Defrenne Cases ^{72/} this limitation becomes even more striking. Although the Court, using its traditional formula for extension in the field of human rights, accepted a prohibition on sex discrimination (derived as forming part of general principles of Community law, inter alia from the European Social Charter and an ILO Convention ^{73/}, these principles could not, at the time of the decision, avail a woman plaintiff who had suffered discrimination as regards her pension rights. The second anchor, the means for projection was at that time, limited rationae materiae, to situations of equal pay ^{74/}. The Advocate General in this case was most explicit: while accepting the extension in a particularly full blooded version ^{75/}, he was as careful to lay down the limits of incorporation: "... in so far as the internal provisions [of the Member State] are not replaced by directly applicable Community provisions", state level of protection must apply ^{76/}. European incorporation is thus limited in its scope to the

substantive areas over which the Community has jurisdiction. With the passage of time the effects of this limitation may be reduced. In the first place the Court has a considerable discretion in determining the scope -- ratione materiae, personae or loci -- of Treaty provisions. An extensive interpretation of these enables more far-reaching absorption and, by necessity, incorporation. Secondly, by the process of expansion, judicial and political, the jurisdictional limits of the Treaty are constantly being widened. As the boundaries extend and the Community's jurisdiction itself becomes more comprehensive the effects of potential Community incorporation might become more pronounced.

I should emphasize at this point that like the doctrine of supremacy, the realization of incorporation would depend on a bi-dimensional process: It must first be articulated by the Court, and then, more crucially be accepted by national courts which would have to give it effect. I have a large measure of scepticism as to the viability of this doctrine in the near future. The Court's pronouncements have been rather timid. More importantly I see very little prospect of courts in the Member States (especially those dualist states which have not "domesticated" the Convention) of accepting incorporation. In this sense I am far less optimistic than some writers who have foreseen this development⁷⁷/ I accept that in the long

run it might develop. Why then is it relevant to our discussion? In the context of mutation we are not concerned with protection of fundamental rights per se. My focus is on the Court's attitude to enumeration. Thus the mere willingness of the Court to take these first steps towards incorporation, tentative as they may be, is another piece of evidence of the shift to a functional rather than strict concept. Whether or not the national courts take the cue is less relevant in this context although I shall return to the issue in chapter nine when discussing the dangers and general limits on mutation.

Footnotes

1. I speak of a framework since the substantive content of these rights can only be determined on a case by case basis and usually in the wake of the Court's decisions and not in anticipation.
2. Later I shall discuss, under the heading of incorporation, the potential for further development.
3. In a certain sense "extension" can be regarded as "contraction": since the development limits the sphere of activity within which the Community organs may freely act. Either way it is a case of mutation and introduces a change in the jurisdictional balance set out in the Treaty under which the Member States assembled in the Council would not be limited by this particular criterion.

4. The bibliography is simply vast. Useful accounts are: Toth The Individual and European Law 24 I.C.L.Q. (1975); Edison & Wooldridge, European Community Law and Fundamental Human Rights. Some Recent Decisions of the European Court and of National Courts LIEI (1976); Hilf, The Protection of Fundamental Rights in the Community in F.G. Jacobs (ed.) European Law and the Individual (North Holland, Amsterdam, (1976) 145 ff.; Philip, La Cour de Justice des Communautés et la protection des droits fondamentaux dans l'ordre juridique communautaire 21 AFDI 383 (1975); H.G. Schermers, Judicial Protection in the European Communities (Kluwer, Deventer, 1979) § 53-56; Drzemczewski, The Domestic Application of the European Human Rights Convention as European Community Law 30 I.C.L.Q. 118 (1981); Proceeding of the Colloquy About the European Convention on Human Rights in Relation to Other Instruments for the Protection of Human Rights (Athens Colloque, Sept. 1978) (Council of Europe, Strasbourg, 1979) esp. contributions by R. Lécourt. See general bibliography in O. Jacot-Guillarmod, Droit communautaire et droit international public (1979).

5. Cf. J. Jaconnelli, Enacting a Bill of Rights
(Clarendon Press, Oxford, 1980).
6. E.g. Articles 169, 170, 171, 173, 175, 176, 177,
184, 215 EEC.
7. Since the travaux of the treaties were never
published.
8. Cf. Cappelletti, The Mighty Problem of Judicial
Review and the Contribution of Comparative
Analysis LIEI 1 (1979). Perhaps the Community law was
considered akin to French administrative law.
9. Canadian judicial review was largely based
on a similar conception. The limited measure
of judicial review for infringement of fundamental
rights in Canada usually turned on the

jurisdictional propriety of the alleged violation rather than its substantive correctness. See e.g. J.D. Whyte & W.R. Lederman Canadian Constitutional Law (Butterworths, Toronto, 1977).

10. The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".
11. E.g. Justice Black & Madison. See J. Ely, Democracy and Mistrust (Harvard U.P., Massachusetts, Cambridge, 1980) f.n. 83; p 34.
12. Id. at 34. Ely does not offer this as a total explanation of the Ninth Amendment but he accepts it as a valid part explanation and certainly as a recognized fear at the time of the enactment of the USA Bill of Rights.
13. Case 1/58 [1959] E.C.R. 17.

14. Joined cases 36, 37, 38 & 40/59 [1960] ECR. 423.
15. Id at 450.
16. "...[T]he Court is only required to ensure that in the interpretation and application of the Treaty ... the law is observed Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that when it adopted its decision, it infringed principles of German constitutional law. Case 1/58 [1959] ECR 17, 26.
17. E.g. Case 9/56 Meroni [1957-1958] ECR 149; case 8/55 Fédéchar [1954-56] ECR 299.
18. Of course the personnel composition had changed both in the Court and the legal service of the Commission which so strongly influences the Court. Cf. Stein, 75 A.J.I.L. 1 (1981).

19. The cases are well known: see e.g. Case 29/69 Stauder
/1969/ E.C.R. 419; Case 11/70 International Handelsgesellschaft
/1970/ E.C.R. 1125; Case 4/73 Nold /1974/ E.C.R. 291; Case
36/75 Rutili /1975/ E.C.R. 1219; Case 44/79 Hauer /1979/ E.C.R.
3727.
20. The doubts stem from the difficulties inherent
in this comparative distillation. Cf. Bellini, La
Tutela dei Diritti Fondamentali Nell'ordinamento Comunitario
secondo La Sentenza Hauer 64 Rivista di Diritto Internazionale
318 (1981).
21. Case 29/69 Stauder /1969/ E.C.R. 419.
22. See Case 44/79 Hauer /1979/ E.C.R. 3727. Cf. Bellini
note 20 supra. The Court accepted the ECHR but
regarded it as a basic minimum standard and was at
pains to show that the protection of its own unwritten law might
be higher.
23. Case 9/74 Casagrande v Landes-Hauptstadt München
/1974/ E.C.R. 773.

24. There are of course some exceptions as in the case of research.

But in general the main state educational functions remain outside Community reach.

Certain expansive developments will be discussed in Chapter Nine below.

25. Article 2 thereof.

26. Interestingly it would seem that within the Federal Republic the competence for this area is reserved exclusively to the various Länder. Thus the Community was claiming a competence which the German Federal Government itself did not enjoy. See submissions of the Advocate-General at p. 783.

27. O.J. 1968 L 257, p.2.

28. At p. 775.

29. At p. 776.

30. Id.

31. And thus also the inappropriateness of the reference by the national Court since in the absence of a conflict the interpretation of Community law becomes irrelevant. Vis, "the interpretation of Article 13 of Regulation no. 1612/68 approved by the Verwaltungsgericht is therefore not justified" at 770.

32. See, e.g. Case 15/69 Ugliola [1969] ECR, Case 44/72 Marsman [1972] ECR, Case 76/72 Michael [1973] ECR 457.

33. The two phase process is important. The Court may in the first phase find the true intentions and scope of a measure and then, at least theoretically, hold that the measure is invalid for lack of competence.

34. See e.g. Case 8/75 Hauts Fourneaux [1957-8] E.C.R. 253. Schermer, note 4 supra at § 290. Lack of competence might even render an act "non-existent". See e.g. joined Cases 6 and 11/69. Rediscount case [1969] E.C.R. 539.
35. Recital 12 (my emphasis)
36. Recital 12 (my emphasis)
37. A use "tertiary rule", adding to Hart's taxonomy, to designate a rule of Community law which is not concerned with substantive obligation but with - in the Community case - the relationship of Community rules of substance to national ones. A primary rule will be a rule of substance. A secondary rule will be a rule of recognition. A tertiary rule will be the ———> rule of relationship. Cf. H.Hart, The Concept of Law (O.U.P., London, 1961) 77-96.

38. As we saw earlier there is of course a fundamental leap when the Court moves from public international law to constitutional law interpretation techniques.
39. A.G. for Canada v A.G. for Ontario [1937] A.C. 326 (P.C.).
40. Passed by Congress on Sept. 25, 1789 and ratified by 3/4/ of the states on Dec. 15, 1791.
41. See generally Karst & Jacobs, Florence Project.
42. Passed by Congress on June 13, 1866 and ratified on July 9, 1868.

43. Gitlow v New York, 268 U.S.

→ 652 (1925).

44. See J. Ely, Democracy and Mistrust (Harvard U.P., Cambridge, 1981) at 24.

Note however that it is not possible in all cases to discuss a minimum or maximum standard. This is usually possible in instances which posit the individual vis-à-vis public authority. But in cases where conflicting values of individuals conflict e.g. in the case of abortion (mother v foetus) there is no maximum or minimum standard.

45. One major advantage is that recognition of a right at the supreme court level has erga omnes effect throughout the states without need to fight the issue in many states. Cf. Shapiro, Frowein and Schulhofer, Florence Project.

46. The best treatment on which I have relied and to which I am indebted is Drzemczewski, note 4 supra.

47. Cf. Shapiro, Frowein, Schulhofer, Florence .
Project. Note that the right applied to
state jurisdiction need not necessarily be
identical to its federal equivalent.

48. E.g. non discrimination, at least in some
forms. Cf. Article 7, 119 EEC.

49. See Cases cited in note 19 supra.
50. Cf. Drzemczewski, note 4 supra and cites therein.
51. Neville-Brown for instance has compared the German doctrine of proportionality with the Common law doctrine of reasonableness. Neville-Brown, General Principles of Law and the English Legal System in M. Cappelletti (ed.) New Perspectives for a Common Law of Europe (Sijthoff/Bruylant, Klett-Cotta, Le Monnier, Leiden, Brussels, Stuttgart, Florence, 1978) at 171. This was cited with approval by A.G. Warner in Case 34/79, Henn & Darby /1980/ 2 W.L.R. 597 (H.L. and ECJ).
52. An example, from outside the sphere of Community activity, is the constitutional attitude to the Death penalty. What could be the common denominator between Germany (which constitutionally prohibits the death penalty) and other states which retain it?

53. Thus for example in Britain, Ireland and Denmark the Convention is not as such part of the law of the land.
54. This was clearly illustrated in Case 44/79 Hauer/1979 ECR 3727.
55. Cf. recent decision by the German constitutional Court which does not really reverse the earlier challenge /1980/ 2 C.M.L.R. 531.
56. Neatly characterised as 'flexible-maximal'. See Duffy, The Relationship between Community Law and the European Convention on Human Rights, Leiden - London Colloque, July 1979 p.3.
57. American practice illustrates that incorporation does not affect higher state standards. See Shapiro, Frowein, Schulhofer, Florence Project.

58. Case 36/77 Rutili v Minister For the Interior
[1975] 11 E.C.R. 1219.

59. Article 48 (3)

60. Council Regulation 1612/68.
Council Directive 68/360.

61. Recital 26 (emphasis supplied).

61a. But see Case 41/47 Van Duyn [1974] E.C.R. 1337.

62. See generally, D. Wyatt & A. Daswood, The
substantive law of the EEC (Sweet & Maxwell,
London, 1980) at 147.

63. There are exceptions, e.g. in relation to public service. In fact France did violate, even discriminate on grounds of nationality (Recital 42 of judgment) as well as violating specific rules. (Recital 31 of judgment).

64. This hypothesis is not entirely fanciful. In Britain certain classes of woman migrants were subjected until recently to virginity tests.

65. At 1232.

66. See Drzemczewski, note 4 *supra*, at f.n. 101.

67. The case of Watson and Belman is another case where incorporation was near. Case 118/75 , Watson & Bellman [1976] E.C.R. 1185.

68. There would be a host of technical problems as to the extent of this domestic application through Community law. See Drzemczewski, note 4 *supra*.
69. Cf. Hauer note 54 *supra*.
70. See supplement to Bull.E.C. 5/76 at 33-34; 38-40. Cf. Drzemczewski, note 46 *supra* at f.n.84.
71. Recital 12.

72. Case 149/77 Defrenne v Sabena [1978] ECR 1365.

73. See Recital 28.

74. Recital 30.

It could however be extended rationae loci to
Community officials. See Recital 29.

75. "I do not think that a lengthy consideration is
necessary to show that the rule that there should
be no discrimination is a general principle of
the Community legal order ..." at 1304.

76. At 1385.

77. Thus I do not share Drzemczewski's optimism
note 4 supra. Cappelletti is far more cautious
merely toying with a distant possibility, note 8

Chapter Eight

Powers Implied by the Court

Our analysis of mutation was concerned with changes in the line drawn between the Community as a general power and its Member States as regards material competences. On the one hand the strict doctrine of enumerated powers would suggest the almost sacrosanct character of the original division, encroachment of which would violate a balance struck in the constituent Treaties the preservation of which is an end in itself. On the other hand, the dynamic character of the Community resulting from those very same constituent Treaties has put inevitable strains on this division. Since the Treaty amending procedure has proved a difficult instrument for accommodating these strains and unlike, say, the Canadian experience, the Community has had few other mechanisms (such as wide taxing and spending powers by which to achieve the necessary mutation without affecting the constitutional division itself), the Community has evolved other mutative techniques. As our analysis of extension, absorption and incorporation have illustrated, Community mutation has affected the actual balance of competences. Yet, as we noted in Chapter Seven, despite the diversity of form and technique, there is a theme which unifies extension, absorption and incorporation. They all relate to situations whereby in the exercise of powers specifically granted to the Community and within an area of authentic jurisdiction

States. This is what was meant by internal mutation. Unlike the Privy Council, the European Court has allowed, in the interest of a realization of Community objectives an encroachment of the demarcation line between Community and States.

Turning now to the theme of this Chapter I would suggest that there can be a higher form of mutation whereby the issue is not one of exercising given powers even if they encroach on the jurisdictional balance of the Member States, but rather, in the pursuit of the objectives of the Treaty, the seeking of "new powers" not perhaps, expressly delineated, but which derive from legitimate substantive competences. The doctrine of implied powers represents the form of mutation whereby these "new powers" are acquired without recourse to the amending procedure.

Traditionally, in discussing implied powers the "judicial method" is distinguished and contrasted with the "political method" exercisable under Article 235 EEC.^{1/} From the legal point of view this distinction is based on the argument that the scope for implication by the Court is not as wide as that available under Article 235.^{2/} From the political point of view there is a far more profound reason for maintaining the distinction. In federal states the classical conflict over competences arises when the federal government seeks to exercise a certain power which is then challenged on the grounds of lack of competences or powers or both. The courts are then called in to adjudicate; the usual technique to legitimate the exercise of power is to suggest that the power is implied in the constitution.

In the Community context the conflict is reversed. More often than not the Court is requested to imply powers not in order to sanction or legitimate Community action already taken, but rather in order to promote or even force the Council of Ministers to act within a Community framework. The Council will often defend non-Community action by relying on a lack of Community powers to act - saying that the action is outside the narrow scope of the Community framework. The Court can prevent them from doing so by refuting a narrow doctrine of enumerated powers and implying a wider scope of Community power. This rather —————> peculiar feature is easily explicable by the hybrid nature of the Council of Ministers which is both the prime Community organ but also the major vehicle for representing the interests of the Member States. When one or more Member States resist a Commission initiative, as say in the case of conclusion of Community agreements in the field of development aid and cooperation they may translate that resistance into a challenge to the competence of the Community to act in the matter. The Court may then be called upon by the Commission to determine whether in fact the Community has the relevant powers with the intention of removing that jurisdictional obstacle. Inevitably this process is most efficient from the Commission's point of view when the Court will not only imply powers but preempt unilateral state action.^{3/}

In examining the evolution of the Court's attitude to implied powers it is possible to identify a process

of approfondissement which is evocative of the general evolution of normative supranationalism. In the first phase the Court was strongly influenced by the doctrine of implied powers found in general public international law and tended to be more restrictive and circumspect. Over time the Court developed the less restrictive attitude of the second phase, as it became influenced by the more extroverted "constitutional" approach exemplified by the U.S. Supreme Court. The doctrine of implied powers in general public international law^{4/} is an elaboration of the principle of effectiveness.^{5/} This principle has played a role in a variety of structural and substantive aspects of international law and primarily as regards the rules of interpretation of treaties.^{6/} It evolves into a doctrine of implied powers when the treaty in question is one setting up an international organization. The zenith of the doctrine may be found in decisions (opinions) of the International Court of Justice in its pronouncement on the supreme international organization -- the United Nations.^{7/} The cases are well known and a brief allusion will suffice for our purposes.

In the Reparations for Injuries suffered in the Service of the United Nations case^{8/} the Court acknowledged that "the Charter did not expressly confer upon the Organization the capacity to include, in its claim for reparations, damage caused to the victim." And yet *the Court* proceeded to state that "under international law, the Organization must be deemed to have those powers

which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."^{9/} The same reasoning was utilised earlier to confirm the international personality of the UN and its general right to bring an action on the international plane. In its opinion on the Effects of Amounts of Compensation made by the United Nations Administrative Tribunal^{10/} the very same language was used by the World Court to sanction the establishment of the administrative tribunal as a forum for adjudicating disputes between the Organization and its staff.

In the American constitutional context we find the locus classicus of an expansive doctrine of implied powers in a federal setting. After acknowledging that "in America, the powers of sovereignty are divided between the government of the Union, and those of the States", and that "they are each sovereign with respect to the objects committed to it", Chief Justice Marshall continued in the oft-quoted statement of principle -

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional..."^{11/}

The language itself suggests a difference in emphasis and sentiment between the two courts. The World Court's language, undoubtedly as an expression of the profound respect to the principle of state

sovereignty, is more circumspect and guarded whereas the U.S. Supreme Court uses a more extensive and extrovert accent. Thus, although doctrine regards both statements as species of implied powers, there are marked differences between the two. It is true that a principle of effectiveness runs through both formulations; but the subject matter of this effectiveness is not identical. The situations in which the World Court deals are introspective; they concern the efficient internal operation of the United Nations as an organic institution, an attitude analogical perhaps to private law concern with smooth operation of company organs. This is clearly the case in the Administrative Tribunal opinions. But also in the Reparations case the Court is concerned to ensure that the individual agents working for the United Nations will be adequately protected -- both as a per se value but also as a means to ensure the motivation of the agent. Thus, the Court explains "in order that the agent may perform his duties satisfactorily, he must feel that protection is assured to him by the Organization, and that he can count on it."^{12/} It is only in a very marginal sense that the powers implied encroach on the domain of the constituent states. Indeed, the Court is at pains to highlight the artificiality of the possible conflict of jurisdiction. Not only does the Court rely on a formal argument to illustrate that there is no jurisdictional conflict ("there is no rule of law which assigns priority to one or to the other"), since the basis of the claim

is different, but as a distinguished authority points

out "The Court could perhaps have added force to its reasoning by pointing to the possibility that some of the agents of the United Nations might be stateless with the result that there would be no State able to protect them."^{13/} The importance of the international doctrine of ~~implied powers~~ should not be underrated. At the same time the powers implied may perhaps be seen as filling an internal vacuum rather than really extending the substantive reach of the U.N. organs.

By contrast, the U.S. Supreme Court was not concerned to fill in a gap in the internal operation of the federal government. The language and the approach are extrovert. The Court's concern is with the entire federal system comprising the states both jointly and severally. And, in adopting an expansive^{14/} approach, the Court was directly affecting the balance between federal government and states.

What position has the Court taken in relation to this dichotomy?^{15/} The jurisprudence suggests a gradual process of movement from the first to the second. In its earlier decisions in the late 50's and early 60's the Court seemed to be relying in its jurisprudence on the more circumspect international law cases. Then came the period of the major constitutionalizing decisions^{16/} whereby normatively the system took on distinct constitutional characteristics. Thus when the issue of powers came up again the time was ripe for the Court to move from the introvert international doctrine to the extrovert constitutional one. It may be

process.

In the Fédéchar case^{17/} the High Authority, already entrusted with the regulation of the coal market sought to depart from the support systems for Belgium coal industry moving from a fluctuating to a fixed subsidy. This was done by a letter addressed to the Belgian government. The validity of the letter and the power of the High Authority to so fix new prices by mere administrative act were challenged. To be sure, we are not dealing with an internal organizational aspect of the High Authority in the same sense as in the United Nations' cases. At the same time the case does not go beyond the province of the traditional High Authority activity.^{18/} What is interesting is the language the Court used in sanctioning the High Authority's administrative action, a language which is very reminiscent of the World Court. It first seeks to narrow down as far as possible the measure of expansion. Thus per the Court "... the power [which the High Authority took] involved in this instance is one without which equalization cannot operate as provided in [the Convention on Transitional Provisions of the Treaty of Paris]". Then, in a statement even more circumspect than the World Court, the European Court states

that without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose [those] rules without which that treaty or law would have no meaning or could not be reasonably or usefully applied.^{19/}

The Court here seems to be taking the most severe

test namely that the expanded power must be necessary and indispensable, to an existing rule. Even the World Court was not as severe as that.^{20/} In two subsequent cases^{21/} the Court repeated this restrictive formula of implied powers. But whereas in Fédéchar the Court sanctioned the High Authority action in these cases it annulled it. Thus whilst acknowledging that "... the rules established by a treaty imply the principles without which these rules cannot effectively or reasonably be applied",^{22/} it went on to limit the application of the doctrine in the cases at hand, precisely because it would involve an encroachment on what was seemingly the province of the states.^{23/}

Compare this language and construction of the doctrine to that which the Court used 10 years later in the famous ERTA case.^{24/} Although the Court still uses the principle of effectiveness it departs from the "necessary or indispensable" construction which stipulates that the power can be implied only if in its absence another rule of the Treaty cannot effectively or reasonably be applied. For here it is willing to confront a situation where there is an absence of internal rules (relating to the regulation and conclusion of international agreements in the sphere of transport policy). The Court instead looks to the entire scheme of the Treaty to "the general system of Community law". This is, in my mind, clearly evocative of the approach of Chief Justice Marshall encapsulated in his famous sentence "It is a constitution we are expounding". The principle of effectiveness which operates

here is on a macro scale ensuring (in the eyes of the Court) the effectiveness of the entire system of external contacts. The language of the Court is general granting an overall implied power of external relations (in the sphere where internal competences exist, naturally) rather than particular and clause bound. The metamorphosis in approach is striking. In the International Rubber Case we see a similar sentiment. Faced with the question whether the Community has the power and competence to engage in a commodity agreement which clearly comes within a notion of cooperation and development rather than strict commercial policy the Court does not hesitate to take the wide approach.^{25/}

The functions (and limits) of judicial implied powers

Despite the obvious movement in the Court's attitude to implied powers it does not constitute a full scale dismantling of jurisdictional limits. For although the powers "implied" may, as we saw in ERTA, be very wide indeed they are always such as to give wider effect and a further reach to policies and jurisdiction already granted in the Treaty. Clearly, under the early Fédéchar approach it would have been unlikely that the Court could have implied the external competence. It needed first to develop the wide "Marshallian" constitutional approach -- the reliance on the general system -- to arrive at that measure of expansion. But it must be recalled, that the widely drawn external competences are linked to existing categories of legitimate Community policies the substantive internal base of which can be found in


the Treaties. Judicial implied powers cannot then be confused with actual material expansion.

What then are the functions of implied power?

The first function may perhaps be cast in a narrow technical legal sense. Although the Court is not able directly to attribute a new substantive competence it can directly expand instrumental powers. Treaty making competence is not in itself a substantive field. But it is a crucial means for achieving more efficiently the objectives of policies in a field already granted.

The second, wider politico-legal function of implied powers brings us back to our departure point. The Council is often reluctant to act supranationally within the Community framework. The reasons for this can be many. First and foremost Member States may wish to retain their individual autonomy. But in many instances they may prefer to act jointly but intergovernmentally -- eschewing the Commission (Communaute) input, avoiding judicial review and European parliamentary consultation, and above all maintaining the subsequent execution in their own hands.^{26/}

If we look at some of the major decisions of judicial expansion in the external relations field such as ERTA, the Rhine Case, the Rubber Case we find this very common phenomenon: attempts by the Member State to act multilaterally but outside the Community framework. The function of judicial expansion in these circumstances becomes not one of supplying the measure for a subjectively felt exigency by the legislature, but rather to prevent the Council or Member States from relying on the absence

of powers as an excuse for non-Community action. Not surprisingly as mentioned above the judicial expansion has always been strongly, even confusingly, connected to judicial pronouncement on preemption. In its earlier jurisprudence not only did the Court imply "new powers" thereby legitimating activity considered beyond Community competences, but it also, in the same breath, preempted Member State activity in this same area. In more recent jurisprudence it has softened its preemptory dictates.^{27/} At the  end of the day, gallant has the effort of the Court been, it has had to concede to the primacy of politics.

For although the Court may take, even drag the governmental horse to the water, it has realised that it is politically impossible or counterproductive to force it to drink. Thus in a style that has become somewhat characteristic of the Court's more recent jurisprudence,^{28/} the Court's expansion decisions include statements of principle with much weaker and more conciliatory operative instructions. Judicial expansion offers the potential but cannot -- in most cases -- enforce its realization.

We must turn therefore to examine the last form of mutation expansion by the political organs in which both limits -- absence of jurisdictional competence and lack of political will -- seem to find their solution.

1. See in particular, Olmi, La place de l'article 235 CEE dans le systeme des attribution de competence a la Communauté in Mélanges F. Dehousse, vol.2. (F. Nathan/Ed. Labor, Paris/Bruxelles, 1979) at 279.
2. Cf. Tizzano, Lo Sviluppo delle Competenze Materiali delle Comunità Europee 21 Rivista di Diritto Europeo 139 (1981) at 151-159.
3. See e.g., The International Rubber Agreement case, Opinion 1/78 [1979] E.C.R. 2871.
4. See e.g., H.G. Schermers, International Institutional Law (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) at § 323 ff.; I. Brownlie, Principles of International Law (Clarendon Press, Oxford, 1979) 686 ff.; Gordon, The World Court and the Interpretation of Constituent Treaties, 59 A.J.I.L. 816 (1965).

5. Cf. Schermers id. at § 1062; Brownlie id. at 687
"In practice the reference /by the World Court/ to
implied powers may be linked to institutional
effectiveness".
6. Especially constituent treaties of international
organizations. Cf. Gordon, note 4 supra.
7. There were of course preceeding decisions as regards
the League of Nations and the ILO. cf. Lauterpacht, note 13
~~infra~~ infra at ch. 18.
8. Advisory Opinion /1949/, I.C.J. 174.
9. At 182.
10. /1954/ I.C.J. 47.
11. 17 U.S. (4 Wheat) 316, 421 (1819).

12. Note 8, supra.
13. H. Lauterpacht, The development of International Law by The International Court (Stevens, London, 1958) at 276.
14. I am not suggesting that a constitutional approach necessitates the expansive approach vis. the Canadian experience. But it does require a consideration of the entire system even if the conclusions can be restrictive.
15. There is much terminological confusion over the different approaches. What I have called introspective extrospective may be similar to a distinction between additional powers (similar to the ILJ notion) and implied powers (similar to the U.S. supreme court notion). Cf. R.H. Lauwaars, note 20 infra.
16. From 1963 onwards. See chapter 2 supra.

17. Case 8/55 Fédéchar [1954-1956] E.C.R. 292.
18. See ^{1.9.1.307-308} ~~en~~ ¹⁹⁹¹ of Judgment.
19. At 299.
20. Cf. R.H. Lauwaars, Lawfulness and Legal Force of Community Decisions (Sijthoff, Leiden, 1973) 97-98.
21. Case 20/59 [1960] E.C.R. 325.
Case 25/59 [1960] E.C.R. 355.
22. At 336 (case 25/59); at 372 (case 25/59).
23. At 338 (of 20/59); at 373 (of 25/59).
24. Case 22/70 [1971] E.C.R. 276.
25. Note 3 supra.

26. The best analysis of this problematique though with conclusions which might involve a measure of wishful thinking is Schwartz, Article 235 and Law-making Powers in the European Community 27 I.C.L.Q. 614 (1978).

27. See chapter 2 and 5 supra.

28. Once again cf. Rubber Case, note 3 supra.

Chapter Nine

External Mutation

A Expansion: An Introduction

In the taxonomy developed earlier in this study expansion was suggested as a high form of mutation. Unlike internal mutation, it is through this process that the Community competences are expanded to include new substantive areas of law and policy not directly foreseen in the Treaty.^{1/} When expansion takes place outside the framework of Treaty amendment/^{procedure} it constitutes the clearest/^{example of an} erosion of a strict doctrine of enumerated powers. Whereas the Court of Justice could in its jurisprudence on implied powers play a judicial role in developing wider instruments for the execution of existing policies -- often in the face of the opposition from the Member States or the Council -- material expansion is properly in the hands of the Community's political organs. In theory at least the Court should play here the role of an impartial federal adjudicator.^{2/}

By contrast with extension, absorption and incorporation which have received less attention at least as steps in the erosion of strict enumerated powers,^{3/} material expansion has been the subject of immense controversy among community commentators.^{4/} It is easy to trace the roots of this controversy since the practice of expansion raises in bold relief the tension between

several basic forces and principles of the Community system. On the one hand, in the words of a leading commentator,^{5/}

It is of great importance for the Member States which transferred sovereignty to the Communities, for the Institutions, each of which has its own responsibilities, and for the citizens of the Ten in whose interest the Communities are to work ... that no powers are exercised unless expressly founded in the Treaties. Without some guarantee that the limits of the Treaties should be respected the Member States might not have been willing to transfer such wide-ranging powers to the Communities at all.

We may add to this and suggest that the approfondissement of normative supranationalism, which in certain respects deepened the sovereignty transfer, might have strengthened this sensibility. The translation of this sentiment into the enumerated powers debate would suggest a strong argument in favour of strict construction.

On the other hand, the open textured character of the Community, its inbuilt dynamism and the underlying wide ideological integrationalist goals seem frequently to be at odds with a narrow concept of enumeration. The Treaty itself is equivocal and may lend support to both a strict and a wide functionalist approach. Thus Article 4 provides that "each institution including the Council shall act within the limits of the powers conferred upon it by the Treaty" but this limitation may of course be interpreted either as alluding to the intra-institutional balance or to the general competences

of the Community as a whole. The same reasoning can be applied to Article 173 which enables the Court, inter alia, to review measures on grounds of lack of competence or infringement of the Treaty. Is this measure intended to prevent the institutions from acting *ultravires vis-a-vis* each other or to prevent the Community as a whole from exceeding its competence?^{6/}

When one comes to the actual enumeration of the powers granted in the Treaty one finds language the ambiguity of which by comparison say to the enumeration in the British North-American Act allows an equal measure of doctrinal difference. Thus, the tasks of the Community set out in Article 2 are extremely wide; there is specific mentioning of the promotion of "... closer relations between the Member States". One could hardly imagine a wider task. Likewise Article 3 which is the general instrumental enumerating clause contains a bewildering combination of specific and open ended clauses.^{7/} I shall be returning to more detailed analysis of this Article below. Exacerbating this tension even further, is the fact that the activities set out in Article 3, which may be regarded as the instruments for the fulfillment of the tasks set out in Article 2, must be read in conjunction with the more detailed implementing provisions in the operative parts of the Treaty.^{8/} And yet as we noted in analysing some of the other forms of mutation these operative parts are often themselves sufficiently open textured

to leave a large margin of interpretative discretion in the process of application. Schermers neatly encapsulates both the tension and ambiguity inherent in this doctrinal confusion:

Under the widest theory of interpretation the attribution of a specific task in the initial articles of the Treaties would imply the grant of all the powers necessary to fulfill that task. Acceptance of this theory [considering that one of the tasks is the promotion of closer relations between the Member States] would mean that the Communities are in the same position as the national governments which are entitled to exercise all powers benefiting the general public. The rules and limitations, expressed throughout the remainder of the Treaties, clearly indicate that such extensive implied powers were not intended. No fixed limits can be set however. It should be accepted that when circumstances change over the years, and detailed provisions of the Treaty become outdated, the general articles at the beginning of the Treaties will assume importance and recourse to implied powers will become increasingly acceptable.⁹

Schermers avoids thus a dogmatic determination of Community competences; moreover he even denies the possibility of setting fixed limits. He stipulates a process of change -- of mutation to use terminology developed here -- and foresees the process of erosion of strict enumerated powers. On the one hand then there is an insistence on the "great importance ... that no powers are exercised unless expressly founded in the Treaties"; on the other hand an acknowledgement of the inevitability of expansion. These then are the two principles —————> between which the dynamics of the process of mutation operate.

My purpose in this chapter will be in the first place to set out the already evolving practice of expansion employing the usage of Article 235 EEC as my main didactical vehicle; then to explain some of the legal and political considerations relevant to this practice attempting to unify our entire analysis of mutation, internal and external (extension, absorption, incorporation, judicial implied powers and expansion), into one coherent explanatory statement regarding the issue of enumerated powers, and finally to offer a critique of this process.

b. Article 235: A Textual Analysis

If the issue of material expansion is the general focal point of the classical discussion of mutation in the Community it is in relation to Article 235 that this discussion appears at its sharpest. In addition to the specific operative clauses that may be found in the Treaty for the realization of the tasks set out in Articles 2 and 3 one may also turn to Article 235 as a general "elastic" clause which on its face offers —————> potential for material expansion. Article 235 -- a grammarian's nightmare -- reads:

If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of this Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measure.

In order to interpret the ambiguous and broad

constitutional language of this Article we are pushed back to the loose language of the enumerating system in Articles 2 and 3 and the operative chapters of the Treaty. What are the "objectives" of the Community? What is a "Common Market"? When is a measure "necessary"? These are the three principal concepts which apparently limit the scope of the Article. But these concepts are so wide and imprecise as to allow a field day for both strict constructuralists and teleologists. We find ourselves in the classical situation of constitutional interpretative theory: Rather than the Article of the "constitution" giving us a precise key to the constitutional doctrine (and so indicate the limits to jurisdictional expansion) it will be the evolving constitutional doctrine which will have to give us the key to a proper interpretation of the Article.

In order to illustrate the doctrinal cleavage which emerges from a per se textual or even contextual interpretation of Article 235 it will be useful to examine briefly some of the conditions set out in the Article itself. It is not necessary for our purposes to engage —> in a rigorous word by word analysis, so frequently done in the past with, as we shall see, such arid results.

Of the various conditions set out in Article 235 the procedural one gives least rise to controversy. Council action is permitted solely on the basis of a proposal by the Commission and after consulting (but not necessarily following) the Parliament. But virtually

all other conditions set out in the Article lead

themselves to controversy between minimalists and maximalists.

a. What are the objectives of the Community the attainment of which are necessary for the introduction of a measure on the basis of Article 235? The minimalist approach might argue for a restrictive interpretation limiting these objectives to the rather technical enumeration to be found in Article 3. But it is difficult to construe "objectives" as a term of art. In fact, Article 3, in elaborating the list of activities refers to these as serving the "purposes" (rather than objectives) set out in Article 2.

And Article 5 which in fact uses the term "objectives" alludes to a concept which undoubtedly is closer to Article 2 than Article 3.^{10/} If then "objectives" is definable in terms of Article 2 it becomes difficult indeed to construe limits which would be narrower than national state limits. Since an "accelerated raising of the standard of living" and "closer relations between the states" is a gate through which almost any measure may pass.

Does this mean that from the strictly textual analysis point of view there are no legal limits to Community expansion? This we cannot say at this stage since we are yet to examine the other limiting elements of Article 235. But perhaps at this point it may be useful to clarify some concepts which are used almost interchangeably in the literature and

which so far I have not distinguished: competences, powers, attribution, and jurisdictional limits.

In principle, mutation in a non-unitary system may be constitutionally limited by reference to ends (substantive jurisdiction) and/or to means (powers). Often the analysis of enumeration is taken to include both ends and means and hence the interchangeability of terms. But there is no necessary symmetry between ends and means. The general power (in our case the Community) may have ——— objectives (ends) drawn in extremely wide terms, but its executive/legislative organs might lack the constitutional powers to execute these ends. As we saw /in a strict doctrine of

enumeration the limited powers are determinant and the existence of wide ends does not give licence for expansion. In a functional system of enumeration the wide ends are determinant and from them the powers are implied.

We might then say that the competences of the general power are the combination of ends (substantive jurisdiction) and means (powers) the limits to which will depend on the openness of the enumeration doctrine.

The asymmetry might (however be different. The general power (the Community) might have the powers (the means) but lack the substantive jurisdiction (the permitted ends). For example many aspects of consumer protection policy may be achieved with the legislative powers already granted the Community. But may these be used without consumer protection itself being an objective of the Community?

This distinction between ends and means may I believe be useful in several ways. Firstly it may help clarify

further the distinction between internal and external mutation; between, say, absorption and expansion. In the case of absorption the question of ends is positively settled. The issue relates to an implication of means. In the case of expansion we are often more concerned not only with the question of means but also with an expansion of ends: with the granting of substantive jurisdiction. Secondly, and consequent on this first consideration, we gain a better understanding of the function of Article 235. Ostensibly, it is concerned only with powers -- it codifies statutorily that which Marshall C.J. established as a judicial doctrine. (Subject of course to the 3 limitations we mentioned). But an examination of the practice of Article 235 reveals that although using the language of powers it is often used for expansion of substantive jurisdiction. Environmental policy, consumer protection and various other areas which I shall discuss below, have all been introduced relying, at least partially on Article 235. How is this achieved?

We must now return to our discussion of the first limiting factor of Article 235 namely that the required action should be necessary for one of the objectives of the Community. If so far I have insisted on the distinction between ends and means I would now emphasise their interchangeability. There is, as a matter of general logic, an interplay between ends and means. X might be the means by which to achieve Y. Y then becomes the

end vis-a-vis X. But Y itself might be the means to achieve a higher objective Z. Y then can be the ends to X and the means to Z. If the "objectives" mentioned in Article 235 were in fact confined to the operational list in Article 3, a policy such as the environmental policy would have to be construed as an end; Article 235 could not be used for its implications. If however Article 2 is utilised as the reference to determine the objectives of the Community, policies such as the environmental policy ^{may} be construed as a means (a power) and Article 235 may be used. For its part the Court has indicated on the one hand that Article 3 definitely comes within the meaning of objectives for the purposes of Article 235.^{11/} It has not, I submit, confined the objectives to Article 3. Elsewhere it has indicated that Article 2 is not merely declaratory but has a binding legal effect.^{12/} It would follow that Article 2 as well could be used for the purpose of defining the objectives in Article 235.

We conclude thus that from the textual analysis point of view the limitation inherent in the "permissible objectives" clause in Article 235 is not in fact/^{conclusively} a limitation. The wide language of Article 2 extends to it a most generous reach. It also enables the legislator by an interplay of ends and means to engage in an expansion of substantive jurisdiction and not merely the implication of powers. The position of many writers that "il faut en effet exclure du nombre des

objectifs qui justifient l'application de l'article 235 les finalités éthiques et politiques"^{12bis/} is I submit unprovable. It merely expresses a preference of the writer and cannot be substantiated conclusively by the Treaty. Schermers' dynamic approach is a more faithful, even honest, acknowledgement of the ambiguity of the text.

b. What then of the second limitation namely that the action should be in the course of the operation of the Common Market? Here again I submit that the Treaty itself is so ambiguous as to allow both a restricted and a wide expansionist interpretation. The minimalist will suggest a technical/functional construction of the term "Common Market" by which it should be confined to the establishment of a customs union, the attainment of the four freedoms, and the creation of defined common policies: agriculture, transport, competition, and commerce. On this basis Article 235 may be used only for measures which can be said to further the functioning of this narrowly defined economic enterprise. But even if the Common Market is to be given this narrow meaning borne out by Articles 2 and 3, there is no compelling reason when interpreting Article 235 to rely exclusively on the use of that term in those particular Articles. Other articles in the Treaty might suggest a wider construction.

Article 38 for example provides that the "... common market shall extend to agriculture" which would suggest the dynamic nature of the term. The minimalist

could of course accept that but suggest that such extension must be explicitly provided for in the Treaty. Similar arguments and counter arguments may be made in relation to other Treaty Articles.^{13/}

However if we turn to Articles 85-86 we find that while the first sentence of Article 85 maintains this functional notion of a Common Market, vis "the following shall be prohibited as incompatible with the Common Market" immediately afterwards we find that the prohibition extends to all agreements" ... which have as their object ... the distortion of competition within the Common Market".^{14/} Article 86 uses similar language vis "Any abuse by one or more undertakings of a dominant position within the Common Market ...".^{15/} Clearly the language here is conceptual even geographical construing the term as denoting an entity limited inter alia in space. Likewise Article 123 speaks of "... opportunities for workers in the Common Market ..." using the same category of a political entity and geographical locus.

If then we are to interpret the term Common Market in Article 235 by reference to this entity-geographical construction we may arrive at a much wider, even unexpected results. Since, on this basis, Article 235 could serve as a basis for material expansion even into the area which is usually held out as totally antithetical with the Common Market - defence. For on the basis of this

construction of the term Common Market would not a threat to the physical integrity of the entity interrupt "the course of its operation" and thus necessitate active or preventive action to obtain the objectives of the Community? Is not the prevention of war a conditio sine qua non to attaining any objective of the Common Market however narrowly these may be defined? The issue becomes even more delicate (since more realistic) in relation to fiscal and monetary measures in particular and macro-economics in general. If one takes the positive imperative obligations found in the operative part of the Treaty it is reasonably clear that the intention was to create an edifice which would operate primarily at the micro-economic level and which would exclude (at least on the level of positive obligations) fiscal and monetary policy.^{16/} The fact that fiscal and monetary measures are mentioned although only as facultative provisions and under a coordinatory regime rather than a mandatory regime makes it difficult to determine whether the positive operative part of the Treaty must be taken as constitutive as to the legal concept of Common Market or whether the Common Market was considered as encompassing the totality of provisions facultative and mandatory. Be that as it may, modern economic theory suggests today that even a faithful implementation of the imperative clauses would result in the establishment of little more than a "Custom Union Plus".^{17/} In other words if a Common

Market in its external modern economically meaningful way is to be achieved one cannot exclude the entire gamut of fiscal monetary and other macro measures.

In this case 'then, textual analysis throws up yet another classical constitutional dilemma. Is the term Common Market to be understood and interpreted in accordance with the perception prevailing at the moment of its conception or may we rely on an interpretation of the concept as understood three decades later in the light of experience and a more sophisticated economic science?

c. The final limitation^{18/} for the usage of Article 235 is the requirement that the measure in question should be necessary to attain one of the objectives of the Community. Here we do not need lengthy textual analysis to establish the ambiguity of the Treaty. The concept of necessity is notorious in the legal lexicon.^{19/} What may seem necessary to one may be excessive to another. It is then classical constitutional language leaving ample discretion to the Court to set limits in accordance with constitutional doctrine.

In conclusion then it is my submission that _____, the language of Article 235 is sufficiently wide to allow interpretation and practice ranging from a strict doctrine of enumeration to a wide functional conception. The Article cannot itself offer precise

normative guidance. We must turn to the jurisprudence and the practice.

6. Expansion: The Jurisprudence

To date there is very little direct guidance to be received from the Court. There is, so far as I know, no major decision of the Court annulling a Community measure on the basis of excess of substantive jurisdiction. I shall later suggest reasons for this absence but it does mean that those Court decisions dealing with Article 235 must be treated with caution since in the few cases in which that Article has been considered it has usually been in other tangential contexts.^{20/} We have already seen^{21/} that the Court has adopted a fairly permissive approach to the alleged limitation of objectives. In ERTA the Court stated the facultative nature of Article 235. This is important because it does suggest that even if Article 235 can be given a wide expansionary function it will not be used as a preemptive device.^{22/} In Massey Ferguson, the major case dealing with Article 235, the Court allowed the use of Article 235 even when other bases for Community action existed. This suggests therefore a permissive attitude to the issue of necessity as well. The Court apparently will not invoke a strict doctrine of proportionality. This development is interesting since in an earlier case^{23/} the Court insisted on the supplementary nature of the Article: "Article 235 offers a supplementary means of action and applies only in the cases for which the

Treaty has not provided the necessary powers for the realization of the object in view".^{24/} In other cases in which the Article was not even pleaded, the Court indicated voluntarily its own view. Thus in a line of case commencing with Rewe^{25/} the Court, while itself exercising a measure of judicial restraint in respecting the primacy of national procedural law even in cases concerning exclusive Community rights and duties, called upon the Member States to utilize Article 235 (and Article 100) so as to introduce a measure of uniformity in community procedural law. This is certainly not the language of circumspection in the use of the elastic clause. A similar inviting reference is made in the Defrenne case.^{26/} We cannot thus get direct guidance on the scope of Article 235 from the Court; if at all we detect a movement towards a greater receptivity as regards an expansionist usage of the Article in say the evolution as regards the concept of necessity.

We might now recall my initial proposition that the textual ambiguity of Article 235 suggests recourse to general constitutional principles Community and other political concepts/^{such as} the ethos of the system in order to get guidance as to the permissible scope of that Article. In this context although the Court has not laid down firm rules it becomes clear in what direction the judicial contribution towards the evolution of such an ethos is moving. In the jurisprudence of the Court we find combination of activism as regards

internal mutation (extension, absorption, incorporation, implied powers) and "active passivism" as regards external mutation (expansion) e.g., a liberal approach to the use of Article 235. In my opinion this suggests unequivocally the Court's unwillingness to maintain a doctrine of strict enumeration which regards the preservation of the initial demarcation as a fundamental principle in itself. Further the Court has demonstrated an unwillingness to regard itself as a federal adjudicator on matters of competences. We shall later have to consider the reasons for this approach and its possible political implications. Before doing that we should look first at the actual practice of expansion.

▷. Expansion: The Practice

My analysis of the practice of expansion will revolve primarily though not exclusively around the usage of Article 235. Two preliminary cautionary remarks would be in order. Firstly it should be remembered that expansion may occur, and has occurred, through a variety of other devices such as, say, Article 100. Article 235 gives thus only a partial picture though one which I believe is representative. Secondly, I shall try in my analysis to highlight the general trend of evolution which has occurred over the past twenty-five years. Inevitably it will be possible to find exceptions to the general trend but, I believe not to the extent of invalidating the general conclusions.

In examining the practice of expansion through

Article 235 I propose to employ a quantitative criterion and a qualitative criterion. As regards the quantitative criterion I shall examine as a key indicator the number of times Article 235 has been used as an exclusive legal basis for Community measures over the years. (For comparative reference I shall also supply the figures of the usage of Article 235 in conjunction with other Treaty articles). Qualitatively I would suggest three categories by which measures based on the Article may be classified. Category One will refer to a usage relying on a narrow interpretation of Article 235 by which only measures supplementing the operation of the Common Market in the narrow functional sense are permissible. Category Two will refer to a wide interpretation which however confines measures to the broad economic sphere. Category Three will refer to a far reaching interpretation which regards Article 2 as bestowing virtual inherent substantive jurisdiction on the Community and which regards as legitimate any measure which can obtain political consensus.^{27/}

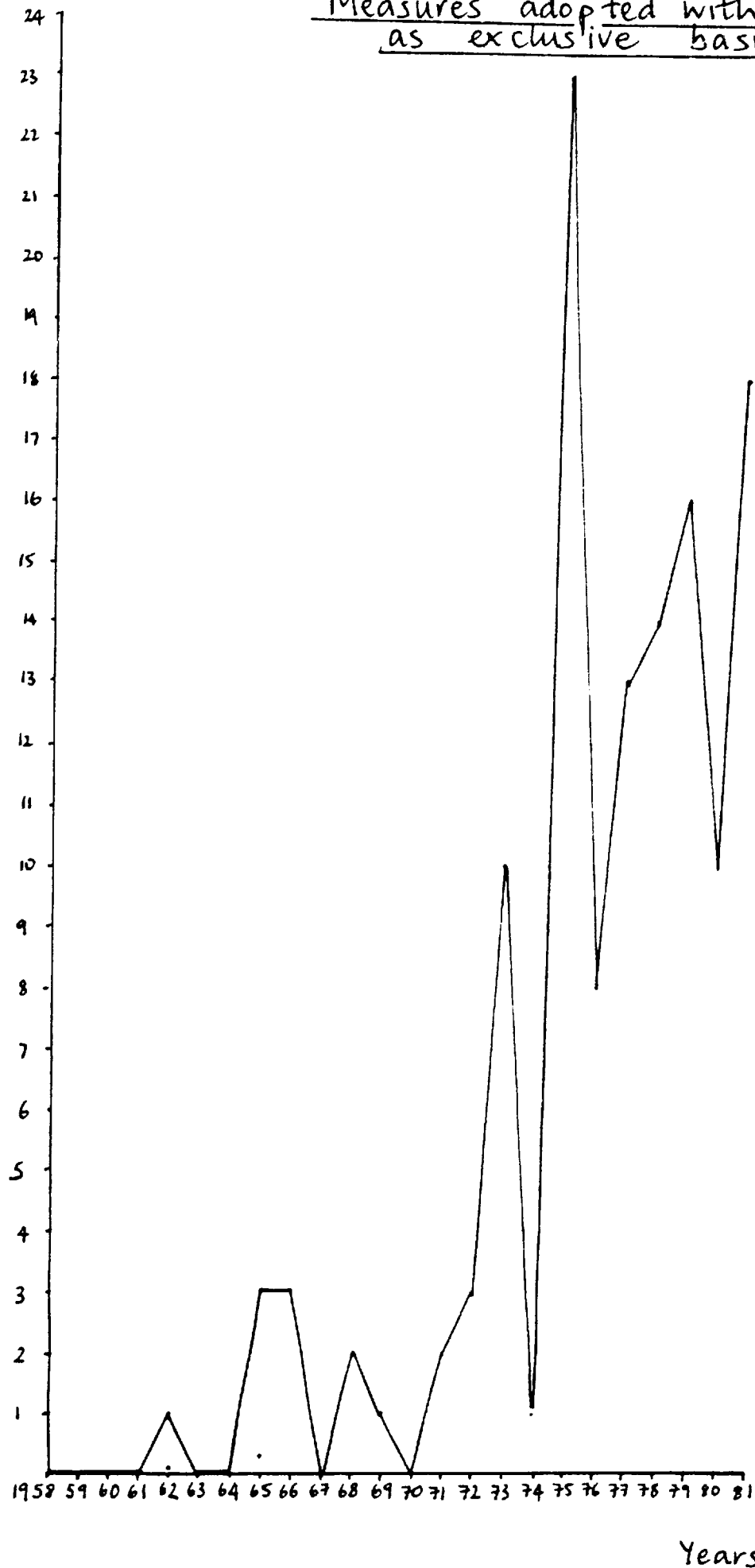
Until the early seventies Article 235 was seldom used as an exclusive basis for Community legislative activity. The few acts promulgated on its basis would certainly fit into the narrow construction of the Article. The principal explanation for this caution lies in the simple fact that the need for expansion

was not strongly felt. The Community was still engaged in the process of implementing its initial policies and the explicit Treaty provisions constituted sufficient a basis for such legislative activity. In addition the notion of strict enumerated powers and the concept of a limited Community were fairly strongly enshrined in the political culture of the time. Whilst the vision of European Union was never abandoned, de Gaulle's "Europe of nations" was, during that period, a powerful controlling force. As the implementation of negative integration advanced and as more and more positive policies (or fragments thereof) came into effect the need for expansion became however increasingly felt. This need is explicable in several ways. In the first place the actual operation of the Common Market (defined in the narrow sense) revealed that reliance on the four freedoms and the few positive policies could not on its own ensure even the limited objective of rationalising production factors.^{28/} In addition the Community could not escape dealing with the social dimensions of an expanding integrating market. Consumer protection and dimensions of labour law to give some examples became pressing exigencies. Finally the Community was displaying dangerous redistributive effects and had to find mechanisms which could counteract the general provisions (especially under the CAP) which while on their face equally applicable to all, tended to favour the rich

farming sectors in the North. ^{29/}

From the mid-seventies we suddenly have a dramatic rise in the use of Article 235 which has been sustained ever since. The rise is not only quantitative as Table 1 shows but also qualitative in the sense that many of the measures now adopted -- in fields such as energy research ^{and} the environment -- necessitated a wider reading of the Article.

Table 1

Table 1Measures adopted with Art. 235
as exclusive basis.

Source: Celex

Whereas on the quantitative level we see therefore a two-phased development with a sharp increase in 1973 which stabilises itself in the mid-seventies I think it is possible to detect a three-phased development on the qualitative level. As mentioned above the first phase is characterised by a usage of Article 235 which is based on a narrow conception both of implied powers and the Common Market. Typical examples might be the Acceleration decision,^{30/} the Regulation defining the customs territory of the Community,^{31/} the Regulation for the nomenclature for external trade statistics of the Community^{32/} and the famous Regulation on the Valuation of Goods for Customs purposes.^{33/}

The second range of measures falls into Category Two which encompasses a much wider concept of Article 235 but one which is still broadly in the economic domain. Interestingly this qualitative development corresponds in time to the quantitative development seen in Table 1. It is in this phase that the Community branched into a variety of new socio-economic activities. Typical measures may be found in the field of the environment,^{34/} Regional policy,^{35/} Energy,^{36/} and monetary cooperation.^{37/} This last development indicates yet another usage of Article 235 in the second phase: the setting up of independent agencies with a legal personality distinct from the Community. Thus in addition to the European Monetary Cooperation Fund, the Council created the European Centre for the Development of

the Improvement of Living and Working Conditions.^{39/}

The third phase is as yet embryonic. Under it we find measures -- at this stage usually projects -- which extend beyond economic activity. Perhaps the predecessors of this phase may already be found in mid-seventies measures in the field of scientific and technological research.^{40/} But recent projects go well beyond that branching into "... education, public health, the free movement of persons not involved in economic life, and protection of wild-life and natural amenities".^{41/}

Thus Lachmann cites as examples the 1978 Commission proposal for a second research programme in the sector of medicine and public health^{42/} (including subjects such as "attempted suicides as a public health problem"); the proposal for special (political) rights for Community citizens;^{43/} and finally the proposals on the role of Community in education.^{44/} To this list we might add the proposals of the European Parliament concerning compensation for victims of accidents and crimes and the harmonisation of extradition laws.^{45/}

To suggest as I did before that it is only in the second phase that the need for expansion was felt may explain the motive for a change in the quantitative and qualitative dynamics of expansion. It does not explain the factors which enabled such a change actually to take place. There is thus a missing link in our analysis.

The explanation of this phenomenon can, I believe, be found in elements already discussed in the study. Three factors must surely be prominent in this explanation: The change in legal ethos by the Court, the changes in the general process of decision making in the Community (primarily the decline in decisional supranationalism) and contingent political factors such as the demise of de Gaulle and the first enlargement.

The effect of judicial policy vis-a-vis attribution de competence is easy to explain. The Court must have contributed, consciously and unconsciously -- especially in the Commission -- to a change of climate as regards the issue of expanding jurisdiction. Each decision of extension, absorption, and implied powers was a signal and tacit hint that the Court would not take a stern view as regards expansion. We also noted the encouraging noises initiated by the Court itself as regards the usage of Article 235. Naturally it is difficult to establish a direct causal link between the Court's activism and "active passivism" and political expansion. But it appears extremely plausible that had the Court taken in a case such as ERTA the narrow restrictive view this would have had a profound negative effect on all forms of political expansion as well.

But whence the political readiness of the governments to engage in this process. The judicial signals

could have, after all, remained without a political response. As indicated above our analysis of the political response must be sought in two directions. In a process commencing in 1969 and culminating in the 1973 enlargement, the Community was seeking for ways to revitalise itself politically. This was a determined effort to extricate the Member States from the 11 years of de Gaulle and from the traumas of double British rejection and the morose of the Luxembourg crisis. An ambitious programme of substantive expansion of Community jurisdiction and a revival of European union at whatever level were the order of the day. Article 235 could be a major instrument to achieve many of these goals relatively rapidly and without major restructuring of the Treaty.

Paradoxically, the decline in decisional supranationalism may, I would submit, have contributed significantly to the confidence of the Member States in engaging in this process. Since by virtue of the ^{over} control achieved by the Member States/the decisional ^{more} process the Community began to look/as an instrument at their service than a usurping power. Each Member State had a greater confidence that its interests would be assured in the decisional process. To be sure, both Article 235 (and Article 100) provide for unanimity. Why then should there have been any initial fear of a wide use of 235 if a proposal could be refused in any event? A veto in Council is not an easy matter. There is a certain political price to pay for its exercise especially if frequent. In addition the veto

assumes a black and white situation. But in most cases the national resistance is not to the entire measure but to certain aspects of it. Opposition to these bits and pieces cannot be vindicated by the veto. Also, there would have been an unease as regards the execution of new policies once promulgated. For, especially in the new category of socio-economic policies, such as environmental control, much discretion would have to be left in the hands of the executive. The prospect of leaving this discretion exclusively to the Commission would have been another cautionary factor. Both the complexity and subtlety of the decisional process meant that the veto power alone, already enshrined in Article 235, would not allay all fears of an expansive interpretation.

The essence of the process of diminution of decisional supranationalism was however that the Member State would have a profound influence at all stages of the decisional process so that when a finalised proposal reached the Council of Ministers the politically embarrassing veto would rarely have to be used. And when a policy came to be executed similar national controls would remain. The decline of decisional supranationalism resulted thus in a potential increase of confidence in the Community by each of the Member States. It is always dangerous to try and pinpoint landmarks in a subtle political process which is essentially gradual but the temporal factor is quite suggestive. By the early 70s the diminution was substantially complete.

The Luxembourg Accord which in 1965 was grudgingly accepted by the other five, especially the Benelux countries, was, particularly during the enlargement negotiations in 1971-72, accepted as a fundamental principle. As I have already pointed out it was a major dimension which featured in the internal British and Danish Accession debates. The COREPER, institutionalised in the Merger Treaty in the mid-60s had by the early 70s fully established itself as a major component in the decisional process. The principle of, and power accorded to, Management Committees in supervising the execution of policies by the Commission, if initially in doubt was legitimated in 1970 by the Court of Justice. Finally, it was precisely at that period that the European Council emerged as a permanent feature and as the prime political motor for future developments. It is not surprising thus to find at that very point in time the Member States at the Paris Summit of (October) 1972 make reference to the need for an increased use of Article 235 and, with the inevitable time lag for preparation of legislation this increased use was to come.

In conclusion the convergence in time of the growing objective need for expansion; the political desire to relaunch the Community; the judicial erosion of a strict separation doctrine; and the decline in decisional supranationalism -- which in this context can be seen as inducing a growth in confidence by the

Member States in the decision making process of the Community -- created the right conditions for the process of expansion which we have seen.

Finally there are two dimensions which should be briefly mentioned before we turn to an evaluation of the implications of this process.

Firstly, whereas I have strongly submitted that the constitutional ethos and political conditions of the Community system have developed in such a way as to permit an expansive interpretation of Article 235, so expansive as to render a strict construction of enumerated powers a matter of dogma no longer applicable to the Community of the 80s the Court has been cautious not to insist on the compulsory nature of Article 235. Its jurisprudence here is perhaps reflective of its approach towards preemption -- namely an approach which prefers political pragmatism to high principle. Thus it is clear that at the limits of the Treaty, say in relation to political cooperation, there could be no insistence that the Member States should legally be bound to use Article 235 rather than the intergovernmental method. Though as I have argued, had the Community chosen to use Article 235, even in this area of foreign policy and defence, there could be a valid constitutional basis to defend such a position.^{46/}

Secondly, we can see now with clarity why in the Community the process of expansion is not met with the same political drama frequently associated with similar developments in federal states. The source of potential strife lies in a situation where the general

power transgresses on the domain of distinct constituent parts. In the Community, especially in the light of the diminution of decisional supranationalism, the governments of the Member States are the general power. Thus there might be conflict and disagreement and even deadlock in the process of deciding an expansion in any particular direction. But once the decision goes through the decisional mill a "political estoppel" prevents the Member States from challenging the jurisdictional basis or constitutionality of the measure. Thus in a case concerning a measure taken under the environmental policy in which the Italian government was under attack for non-implementation of a directive it explicitly said that it would not raise in its defence the questionable jurisdictional basis of the act.^{47/}

ε. Mutation: An Evaluation

Undoubtedly the process of mutation, internal and external, is evidence of the dynamic and flexible character of the Community and of its ability to adapt itself to changing exigencies felt from within and without. This does not however mean that the process is without its problems and dangers.

The question of legality and constitutionality

In the preceding analysis I have submitted that the consensus, shared by most (though not all) writers, that Article 235 legally limits external mutation (expansion) to measures taken in the broad economic field cannot be proven on the basis of the Treaty. It is a view which rests on an assumption that the word objectives in Article 235 must be confined exclusively to those set out in Article 3 and that the concept of Common Market is limited to its functional economic meaning and not to its political-geographical one. I argued that there was, in my submission, nothing either in the Treaty or the jurisprudence which necessitates such a restrictive view.

Does this mean that there are no limits to the usage of Article 235? After all the construction of the Article (the 'if' clause) suggests that some limitation is intended. I think limitations do exist and these may be found on two levels of legal and constitutional analysis. As a preliminary remark I would observe that it is not impossible that the framers had a limiting intention but the language chosen was such as to defeat any unambiguous construction of this precise meaning. Limits can, and indeed ought to be found for reasons I shall presently suggest.

On the textual level I think that despite its ambiguity Article 235 does impose two substantive limitations. The first is a limitation on capriciousness and arbitrariness. Article 235 must be used for bona

ended instrument of governance or (economic) oppression. It is another basis from which the Court might derive legitimacy in reviewing the legislative and administrative practices of Community organs when these operate on the basis of Article 235 at the periphery of the Treaty.

The second limitation, still within the textual framework, is more tentative. I have argued that Article 235 can be used for "... finalités éthiques et politiques". But these, I would suggest must be integrated into the operation of the Community. Thus I am suggesting that the wording "in the course of the operation of the Common Market" imposes a dictat of gradualism. The process of expansion should not operate in leaps and bounds. New measures adopted on the basis of Article 235 must be seen as relating and responding to and solving problems created by the already existing acquis. The Article thus imposes a discipline of growth.

This of course poses a formidable and legally imprecise task on the Court. But, I believe, it is one which should not be shirked especially in the light of the second order of constitutional analysis.

This second order of constitutional analysis takes us outside the textual analysis of the Treaty. Whereas our earlier analysis of decisional supranationalism helped us to understand the dynamism of expansion, we must turn now to the analysis of normative supranational-

lism to understand a major constitutional constraint. The evolution of the normative structure of the Community is based on a judicial-constitutional contract between the European Court of Justice and its supreme counterparts in the Member States. The European Constitution is integrated with the national constitutions. In its key judgments laying down the foundations of normative supranationalism the Court has always insisted that the new legal order was based on a limitation of sovereignty by the Member States in favour of the Community albeit within limited fields. It was on this basis of material limitation that the Court formulated its new doctrine and "called" for constitutional cooperation by the national legal orders. The acceptance by these orders -- at least some of them -- is indeed on that basis of limitation. Thus, in Chapter Five, I have already shown how the Italian Constitutional Court accepted, after a long resistance, the normative structure" ... on the basis of a precise criterion of division of jurisdiction".^{48/} Shades of the same argumentation may be found in the Decision of the French Constitutional Court^{49/} and to a lesser degree the German Constitutional Court.^{50/} Among the new Member States Denmark offers the clearest example of an order which regards jurisdictional limits as essential to the "constitutional contract".^{51/}

An unchecked expansion might thus have two adverse results. It could lead to a loss of confidence in the European Court by its national counterparts and, secondly, it might threaten the already existing normative structure. It is important thus that the European Court assert itself in this field. It might choose to adopt a substantive criterion of limitation. (The Treaty does not impose this but neither does it prohibit it). Or else it might prefer a more process oriented, reflexive type of criteria based on gradualism and perhaps even the manner in which the measure was adopted. This last point leads us indeed to the second evaluate criterion of expansion - its democratic character.

The Question of the Democratic Character of Expansion

The traditional non-legal argument used in attempting to limit the scope of Article 235 or in criticism of the expansive practice of the Community is the loss of democratic control which this procedure involves. Usually the argument is made by contrasting Article 236 the Treaty amending procedure with Article 235. Since the Treaty was concluded for an indefinite period the framers recognized that it would be impossible to foresee all potential contingencies which might call for amendment. The Treaty includes therefore an open-ended general amending formula. Article 236 EEC provides that

The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

It comes as no surprise that the formula adopted in this Treaty Article is far more restrictive than the normal provisions for legislative change. The Treaty, akin to a constitution in municipal systems, is the fundamental law of the Community. Constitutional amendments traditionally encompass a variety of procedural safeguards. In the context of an international system of enumerated powers these safeguards might have seemed particularly appropriate when the balance of competences between centre and periphery was at issue. Thus, this "amending maze" foresees a uniquely controlled decisional process. The right of proposal is formally (and initially) granted to each government of the Member States as well as to the Commission. Since amendment invokes in its final phase national parliamentary ratification one could envisage that a national government even before making a proposal for amendment would already consult its own assembly. The proposal must then encounter the usual deliberation in council and may proceed only with unanimous agreement. Con-

sultation with the European Parliament is obligatory as well as, in the case of a Member State initiative, consultation with the Commission. The process must then repeat itself in a diplomatic conference which, again, must reach common accord. Finally, and crucially, each national parliament retains a power of veto over each proposed amendment.

One could cogently argue that the procedure over changing the Treaty should correspond to the procedure by which the Treaty was made. But here one goes even further since we have an accumulation of both the Community and the diplomatic decisional processes. When the Treaty of Rome was concluded this accumulation may have seemed indispensable: to exclude the diplomatic tier would not have accorded with the initial international character of the Treaty; to exclude the Community tier would enable amendment without reference to the Community institutions.

The process of amendment may involve a double set of tensions: one which involves a political tension between the Community and the Member States and the other between the executive and popularly elected parliaments. The coinvolvement of both national political organs and national assemblies -- as well as the European Parliament and the Commission -- might be an attempt to diffuse the tension in both instances.

And yet, despite the forcefulness of the political argument for an accumulation of decisional processes and notwithstanding the democratic sentiment and public international law principle which explains the ratification power vested in each and every national parliament, a dissonance has emerged between on the one hand the dynamic evolutive nature of the Community and its political and economic momentum, and, on the other hand, the restrictive nature of the amending procedure. In the perspective of thirty years this dissonance has translated itself into a discrepancy, which does not come as a surprise to the student of comparative federalism. Whereas the Community has seen wide ranging and, at times, profound substantive and system changes -- mutations -- in its structure very infrequent and little use has been made of Article 236. Does this mean that we may consign Article 236 into the legal and political wastebin? A simple affirmative answer could perhaps be given if we were interested merely in the actual process of mutation. But the importance of Article 236 does not lie in the frequency or otherwise of its usage. Rather it lies in its potentially debilitating normative effect. The insistence in the Article on a specific procedure, and above all the unanimous ratification requirement by national parliaments, may be construed with persuasion as illegitimizing all other

forms of alleged amendment which avoid these safeguards. Criticism of Community mutation, judicial or political, which is not based on the formal amending procedure, tends to focus on the omission of the national parliamentary function. From the strict legal point of view the existence of Article 236 EEC necessitates a construction of mutation which will distinguish it from amendment. The narrow legal argument is simple enough. Provided a correct use is made of Article 235, observing all its procedures etc. one may do everything which the Treaty does not explicitly prohibit. Only where such categorical prohibitions are concerned will one have to resort to Article 236. This is a construction consonant with Marshall's distinction in *McCulloch*. Whereas this construction can overcome perhaps narrow legal objections to the non-usage of the amending procedure, it leaves open the wider objections which regard the provisions of Article 236 EEC as encapsulating broad representational and democratic principles. After all, there is an inevitable measure of legal fiction and constitutional choice in the interpretation which allows the exclusion of Article 236 EEC. The mere fact that a dissonance exists between an objective or subjective need for mutation and the inflexibility of the formal amending procedure may explain but does not in itself justify or legitimate the ensuing discrepancy between practice and constitutional/Treaty provisions. These may be

designed for precisely this reason: to serve as a check on wholesale 'undemocratic' mutation.

It is difficult to negate completely this argument. It is possible however to qualify it and illustrate its possible weaknesses. For the dissonance between the dynamism of the Community and the apparent cumbersome of the amending procedure and the consequent discrepancy between the wide practice of mutation and the low usage of Article 236 do not only represent a conflict in which expediency is preferred to principle. Rather it reflects a tension which is in the Treaty itself -- the tension between internationalism and constitutionalism. The contrast between, say, Articles 169 and 177 or between programmatic provisions such as Articles 85-87 EEC and Article 220 are familiar illustrations of this tension. The severity of the amending process has rendered it very much at variance with, and inapplicable to, the transformed constitutionalised order of the Community which it was designed to control. Article 236 is a reflection of a formal order which existed perhaps in the Treaty of 1958 which no longer corresponds to reality. In the light, say, of our analysis of decisional supranationalism which included for example the establishment of the European Council and the prominence of COREPER in most echelons of decision making, it hardly makes sense to call for a formal diplomatic conference, as 236 EEC does, when the organic Community decision making process has become,

for that type of fundamental issue, extremely diplomatic in substance and form. Likewise, the evolution of the normative structure of the Community and the progress in substantive integration, in short, the realization of a constitutional legal order call into question the single national Parliamentary veto power provided in the formal amending procedure. Article 236 simply does not recognize the possibility of real Community building.

Under a constitutional perspective rather than international, one may wonder, polemically perhaps, if democratic principles are really satisfied when a few deputies in the Luxembourg Parliament representing a miniscule fraction of a Community population of several hundred million should be able to thwart any Treaty amendment. Or whether there is much meaning in preserving
/ an international legal framework in a system which in so many ways departs radically from the classical international legal tradition. This range of questions played a part in the transformation of the American system from confederal to federal. One of the changes was indeed concerned with the liberalisation of the amending formula. I would submit, that at least in the normative sense, as defined in this study, Europe of the 60s and 70s displays even more federal characteristics than the USA at the second constitutional conference.

The democratic argument based on Article 236 is not thus water tight. Nevertheless one should be careful not to carry these arguments too far and this for several reasons. Even a more flexible amending procedure, say requiring only a majority of state ratification would still remain cumbersome. The pressure for "non-constitutional" mutation would remain strong.

The main reason however for caution is the absence of the Community's own parliamentary chamber which may legitimate -- at least in the formal sense -- mutation outside the framework of Article 236. At present the growth of expansion does not merely raise the political problem of a further transfer of power from the Member States to the Community.

Indeed I have argued that this political issue is diffused since the transfer is not only from the Member States but it is also by the Member States. It raises instead the problem of an increased transfer of power from parliaments to the executive and administration since there is no adequate body at the European level -- certainly not the European Parliament under its present limits -- which can fill that gap. This dimension increases even more the responsibility on the Court to fill, so far as possible, this control function.

Expansion: the decision making and representation
dilemma

There is one more dimension which poses serious questionmarks over the process of expansion. Parliamentary control, even, say, by the European Parliament (should it get a codecision function in relation to Article 235 as suggested by the Vedel Report) can bestow formal democratic legitimacy on the process. It does not necessarily ensure the social acceptability of the eventual outcome. The drive for expansion is increasingly in the areas of social law: consumer protection, environmental protection, education etc.

Overall material expansion might, as I said, be legitimated legally and even, in the future, in a formal democratic sense. But the elaboration of detailed operative measures will rely on the existing decisional processes in the Community. These, as I suggested in Chapter Three, are extremely inadequate at least in some respects. Whether we use a more old fashioned model of representational democracy or whether we accept neo-corporatist models it is clear that in the social fields interest groups representing varying social exigencies have been integrated to one degree or another into the national policy making processes. A transfer of competences, even partial, to the Community disrupts the equilibria achieved at the national scene in at least some of the Member States. Moreover, the current Community decision making, with its growing emphasis on secrecy, with its inevitable channeling of

British position on consumer protection?) tends to favour certain interests which can better operate at the Brussels level and disfavours others - those for example which rely on parliamentary pressure. The decisional process can in this perspective be damaging to the objectives of expansion.

In conclusion the entire stay of mutation reveals once again the basic fundamental traits of the Community: An organism oscillating between internationalism and constitutionalism, between confederalism and federalism. The contrast between Article 236 and 235; internal mutation and external mutation, normative constitutional structures and decisional international structures are all reflections of this oscillation. It is difficult to predict the direction the process will take in the future. But perhaps one lesson should be left from my analysis. The main issue is not whether or not the system can legally or otherwise mutate, nor is it one of what directions should the Community branch into. Rather, the main issues^{should} be the manner in which new competences are exercised, the responsiveness of the decisional system; the gradualism of development. In the final analysis it is the ability of the Community to respond to social exigency which counts. Getting the competence is only the first step. Exercising it is quite another challenge.

1. There is of course a measure of begging the question at this point as to the Treaty basis of expansion. Even the most far-reaching "expansionists" rely on a measure of Treaty legitimacy.
2. Cf. Articles 4; 173 EEC; And see H.G. Schermers, Judicial Protection in the European Communities (Kluwer, Deventer, 1979) at § 193.
3. The illustrations I gave, especially in the field of human rights have been analysed extensively but not always as part of a process of jurisdictional mutation.
4. See e.g., Lauwaars, Lawfulness and Legal Force of Community Decisions (Sijthoff, Leiden, 1973) 94ff.; Schermers, note 2 supra, § 264 ff.; Schwarz, Article 235 and law making powers in the European Community 27 I.C.L.Q. 614 (1978); Tizzano, Lo Sviluppo Delle Competenze Materiali Delle Comunità Europee 21 Rivista di Diritto Europeo 139 (1981); Marengo, Les conditions d'application de l'article 235 du Traité CEE, 13 R.M.C. 147 (1970); Olmi, La place de l'article 235 CEE dans le systeme des

attributions de competence a la Communauté in
Mélanges Fernand Dehousse (F. Nathan/Ed. Labor,
Paris/Bruxelles, 1979) 279; Lesguillons, Extension
des competence de la CEE par l'article 235 du traité
de Rome A.F.D.I. 886 (1974); Giardina, Sulla
competenza a stipulare della Comunità Economica
Europea 54 Rivista di Diritto Internazionale 609
(1971); Giardina The Rule of Law and Implied Powers
in the European Communities 1 I.Y.B.I.L. 99 (1975);
Ferrari-Bravo & Giardina, Commento all'art.235 in
Quadri, Monaco, Trabucchi, Commentario al Trattato
istitutivo della Comunità economica europea
(iofrè, Milano 1965) 1707.

5. Schermers, note 2 supra.
6. Indeed in the latter case we would probalby have
a situation of a non-existent act rather than
lack of competence.
7. E.g., Article 3j speaks of the establishment of the
European Investment bank whereas Article 3h speaks
of the approximation of the laws of the Member
States to the extent required for the proper
functioning of the Common Market.

8. Thus Article 3 commences: "For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty" (emphasis added) and then comes the enumeration of the Article.
9. Schermers, note 2 supra, § 266 (emphasis added).
10. Article 5 defines a specific and general obligation on the Member State to fulfil their Treaty obligations. In particular they must abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. This is language wider than the positive obligation in the first part of the Article (ensure fulfilment of obligations).
11. Case 8/73 Massey Ferguson [1973] E.C.R. 897.
12. E.g., Case 6/72 Continental Can [1973] E.C.R. 215.
Recital 23-25.
- 12 bis. Olmi, note 4 supra cited with approval by Lachmann
note 27 infra.

13. E.g., Articles 67; 99; 100; 105; 115-117; 130;
224-226 EEC.
14. Emphasis supplied.
15. Emphasis supplied.
16. Cf. J. Pelkmans Florence Project.
17. Id.
18. There are of course other limitations e.g., that
the Treaty has not provided the necessary powers
etc. These however do not pose serious policy
dilemmas. Cf. Tizzano note 4, supra.
19. In the context of European Community law it is often
considered in relation to the exceptions to the free
movement of goods provision. Cf. Case 34/79
Henn & Darby [1979] E.C.R. 3795.

20. The main case is Massey Ferguson Case 8/73 /1973/ E.C.R. 907. Other cases in which Article 235 was considered are: Joined Cases 2 and 3/62 Commission v. Luxembourg /1962/ E.C.R. 425, 430; Joined Cases 73 and 74/63 International Credit /1964/ E.C.R. 1, 28; Case 38/69 Commission v. Italy /1970/ E.C.R. 57; Case 22/70 ERTA /1971/ E.C.R. 283; Case 33/70 Sace /1970/ E.C.R. 1213-1221; Case 43/75 Defrenne /1976/ E.C.R. 455, 470; Case 33/76 Rewe /1976/ 1998; Case 45/76 Comet /1976/ E.C.R. 2053; Case 61/77 Commission v. Ireland /1978/ E.C.R. 28; Case 151/77 Peiser /1979/ E.C.R. 3, 7; Case 11/78 Italy v. Commission /1979/ E.C.R. 2, 28; Case 27/78 Rasham /1978/ E.C.R. 7; Case 95/78 Dulciora /1979/ E.C.R. 5, 15; Case 157/78 Trawigo /1979/ E.C.R. 3, 7, 8; Cases 4/79 and 109/79 ONIC /1980/ E.C.R. 5, 19; Case 145/79 Roquette /1980/ E.C.R. 10, 34, 41.
21. Text to notes 11 and 22 supra. In Massey Ferguson however it refers to Article 3; I do not believe this is an exclusive reference. When in Rewe and other cases the Court recommends the utilization of Article 235 so as to eliminate disparities in national procedural law, this surely must apply to national procedural law involving areas of Community activity which are not within a narrow definition

of the Common Market. Likewise in Defrenne Article 235 is mentioned in the context of expanding the social policy of the Community.

22. Schwartz, note 4 supra, has consistently argued for the preemptive character of Article 235 suggesting that the Member States cannot adopt measures when these measures fulfil the conditions of Article 235. Neither the Court (in ERTA) nor the practice is consonant with this assumption.

23. Case 73 and 74/63, note 20 supra.

24. At 29.

25. See chapter 11 infra and cases in note 20 supra.

26. Case 43/75, note 20 supra at Recital 63.

27. For a similar categorization cf. Lachmann, Some Danish Reflections on the Use of Article 235 of the Rome Treaty 18 C.M.L.Rev. 271 (1981).

28. Cf. Pelkmans note 16 supra.
29. Cf. The Economist, 5.11.1977 at p 54 ff.
30. Council Decision 66/532 O.J. of 21.9.1966 p.2971.
Note that this measure was also based on Article
14 EEC.
31. Council Regulation 1496/68, O.J. L 238/1 of 28.9.68.
32. Council Regulation 1445/72 O.J. L 161/1 of 17.7.72.
33. Council Regulation 803/68 O.J. L 148/6 of 28.6.1968.
This was the subject of controversy in the Massey
Ferguson.
34. Declaration of the Council of the European Economic
Communities and the Representatives of the Governments
of the Member States of 22.11.1973 OJ No.C/112/1 of
20.12.1973 on the programme of action of the European
Communities on the environment; Convention, signed
at Barcelona on 16.2.1976 for the protection of the
Mediterranean Sea against pollution.

35. Council Regulation (EEC) No.724/75 of 18.3.1975
entry into force 22.3.1975 OJ No. L 73/1 of
21.3.1975 establishing a European Regional Development
Fund.
36. Council Resolution of 17.9.1974 on a new strategy
OJ No. C 153/1 of 9.7.1975; Council Resolution of
17.12.1974 concerning Community energy policy
objectives for 1985 OJ No. C 153/2 of 9.7.1975;
Council Resolution of 17.12.1974 on a Community action
programme on the rational utilization of energy
OJ No. C 153/5 of 9.7.1975; Council Resolution of
13.2.1975 concerning measures to be implemented to
achieve the Community energy policy objectives adopted
by the Council on 17 December, 1974 OJ No. C 153/6
of 9.7.1975; Council Resolution of 26.6.1975 on
the setting of a short-term target for the reduction
of oil consumption OJ No. C 153/9 of 9.7.1975;
Council Resolution of 26.6.1975 extending the powers
of the Advisory Committee on Programme Management
for "Treatment and storage of radioactive waste"
(direct action) and "Management and storage of radio-
active waste" (indirect action) OJ No. C 153/10 of
9.7.1975; Council Resolution of 9.12.1975 on the setting
of a short-term target for energy saving for 1976/77 OJ
No. C 289/1 of 17.12.1975; Council Regulation (EEC)
No. 1302/78 of 12.6.1978, OJ No. L 159/3 of 16.6.1978

on the granting of financial support for projects to exploit alternative energy sources; Council Regulation (EEC) No. 1303/78 of 12.6.1978, OJ No. L 158/6 of 16.6.1978 on the granting of financial support for demonstration projects in the field of energy-saving.

37. Council Regulation (EEC) No. 907/73 of 3.4.1973, OJ No. L 89/2 of 5.4.1973 establishing a European Monetary Cooperation Fund.
38. Council Regulation 337/75 OJ L 39/1 13.2.75.
39. Council Regulation 1365/75 OJ L 139/1 30.5.75.
40. Council Regulation (EEC) No. 2380/74 of 17.9.1974, OJ No. L 255/1 of 20.9.1974 adopting provisions for the dissemination of information relating to research programmes for the European Economic Community; Council Decision (75/200/EEC) of 18.3.1975 OJ No. L 100/18 of 21.4.1975.
41. Lachmann, note 27 supra at 10.

42. OJ C 213/3 1978.

43. Giving right of residence to Community nationals
in other Member States - OJ C 207/14, 1979.

44. "Resolution prepared in the Committee for Education
on

- the European Community and Europe in Schools
- the admission of students from other Member States
- foreign language teaching
- preparation of girls for working life and equality
of opportunity for girls and boys in society.

The material context of the projects has been approved
whereas the problems of the legal form and budgetary
consequences were referred to the Coreper for further
studies" Lachmann, note 27 supra, at 12.

45. OJ C 77/77 6.4.1981; PE 77.141.

46. There has however been a lively academic debate
whether in matters pertaining directly to the
jurisdiction of the Community, the Member States are
obliged to use Article 235 as an expansive method
rather than on intergovernmental agreement. Dr.

supra, has suggested strong arguments for such an obligation. But, the Court in its jurisprudence, wisely I believe, has not given full support to this alleged obligation. Its pragmatic approach on preemption especially the recent decision in the Rubber Case would suggest an attitude which moving in that direction stops short of actually obliging the Member States.

47. Case 91/79 Commission v. Italy [1980] E.C.R. 1099.

48. Frontini [1974] C.M.L.R. 372, 385.

49. Decision of December 30, 1976.

50. [1974] 2 C.M.L.R. 551.

51. § 20 of the Danish Constitution.

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P A R T T H R E E

Challenges

In the first two parts of this study I attempted to analyse systematically the relationship between the Member States and the Community. Part One and Two dealt respectively with this relationship as it manifested itself in the hierarchy of actors and norms (Part One) and the distribution of competences (Part Two). In relation to both spheres we observed a fundamental legal development: The transformation of the Community from an international order (albeit one with unique features even at its inception) to a constitutional order. This metamorphosis occurred primarily in the period commencing in the mid-60s and continuing into the mid-70s and was accompanied by a divergent political trend. If the first decade of legal Community life (early 50s to early 60s) may be called the international phase, this second decade may be called the constitutional phase the key characteristic of which was perhaps conceived with the establishment of effective and uniform precedence of Community law and policy over competing national measures and with the destruction of strict enumeration as a severe constraint on Community activity.

However this maturity of the system in itself has created problems and challenges for future Community development. In a certain sense these challenges --

the symptoms of which have already emerged in the late 70s -- can be seen almost as being born out of constitutionalization process and from substantive expansion.

Effectiveness cannot be guaranteed solely by the existence of solid constitutional principles and accepted relational hierarchies. These only ensure a theoretical resolution to potential Community-national conflicts. Substantive Community policies and law must be applied and the duties and rights they bestow vindicated and enforced. Should concrete application of policies or vindication of rights be impaired -- or executed in a manner inconsistent with Community norms -- the constitutional principles of normative supranationalism will be rendered arid.

Effective application may be inhibited by several factors both legal and extra-legal. I propose to deal with three of these factors each indicative of a larger problem and each operating at a different level in the complex Community social, political and legal order: The problem and challenge of non-compliance; the problem and challenge of uniform application and the problem and challenge of Access-to-Justice.

Thus in Chapter Ten, in dealing with the issue of non-compliance we shall see both the operational and policy difficulties of preserving the integrity of the system of compliance analysed in Part One. I shall be

more concerned to outline the problem and explain the difficulties of translating sound constitutional principle into practice. Equally in Chapter Eleven, in analyzing the issues of uniformity and access-to-justice I shall hope to show how the very normative architecture and its interaction with the decision making process produce a serious conflict between uniformity and diversity claims. Here it is important to remember that whereas I have chosen to deal with one illustration of the problem as it manifests itself in the procedural field (with constitutional implications), the problem of Uniformity vs. Diversity will be surfacing increasingly in all spheres of Community life.

The Golden Thread linking the challenges of non-compliance, uniformity and access-to-justice and making these an important next phase in the evolution of normative supranationalism is the notion of effective and fair Community-wide implementation and protection; In making constitutional developments a sound reality and not hollow principles. If this analysis were concerned with the prospects of both European integration and the Community as a whole, I would have tried to point out those substantive areas of social and economic policy where Community action is needed. Supranationalism as discussed here is, however, concerned with the framework and instruments within which the policies may be adopted. In this sense it precedes the concrete policies. The

was the necessary first step in laying down the hierarchical and competence relationships. These principles may have been sufficient in a period in which the common rules and principles called primarily for elimination of certain Member State practices. In a period increasingly characterized by the need for positive Community policies, normative supranationalism must develop so that the application of these policies, within, and mostly by the organs of, the Member States will be equal and efficient and will not destroy or contradict the principles already pioneered. A sound normative basis will thus be a condition for the success of all present and future substantive policies.

What then of developments in the decisional field? Here the symptoms are far less clear, the crystal ball far more obscure. I propose therefore in my concluding chapter to deal briefly and tentatively with two developments which might affect the decisional game: The second enlargement and direct elections to the European Parliament. In this sphere I can do no more than offer a few possible options or future scenarios for development. Questions may be posed but answers only guessed at.

Chapter Ten

Implementation, Application and Enforcement of Community
Law: The Challenge of Non-compliance^{1/}

A. Non-compliance - an Introduction

Earlier in this study (chapter 4) I analysed the system of compliance of the Community suggesting that it constituted an essential feature of the supranational order. The basic characteristic of this system which involved a unique combination of international and constitutional law was the emergence of a so called "all or nothing" effect. The major elements in producing that effect were the existence of a compulsory jurisdiction of the European Court of Justice entitled to review directly Member State compliance, the supervisory and prosecutory function of the Commission as public attorney general and, above all, the unique tandem of the European Court and national courts established by the preliminary ruling procedure under Article 177 EEC. The emergence of the effect, albeit incomplete, essentially meant that unlike traditional international systems, the element of complete voluntariness in the execution by states of obligations resulting from membership in an organization was removed. Judicial judgment, often emanating from a court of the recalcitrant Member State itself, substituted considerations of utility or fear of reciprocal breach by other states

as a major sanction against breach which are the usual motivations for compliance under normal treaty relations. I argued ^{further} that whereas Member States retained the political option of withdrawal from the Community they had lost the option of total selectivity in the fulfilment of their obligations during membership. The rule of law within the Community had thus begun to resemble much more a municipal legal system than an international order and Community norms achieved a "habit of obedience" associated with national law.

All this however does not mean that law infraction by Member States and its rectification do not present a problem in the Community. The "all or nothing" effect represents a constitutional and judicial structure, a legal ethos and perhaps even a changing attitude to Community law in contrast to international law. But the existence of all these elements does not ensure that no infractions will take place nor can it ensure without more that all infractions will be rectified or remedied. This is not surprising. The problems facing the Community system are not in principle dissimilar from those facing any national legal order in Western democracies. In these states we find developed legal and judicial structures, a system of sanctions and effective means of enforcement. And yet we know that these structures

and sanctions cannot eliminate law breaking by the subjects of the law. Nor can they ensure that all offenders are detected and punished. Equally, and of greater interest to us, the enormous rise in administrative law litigation in our epoch indicates a similar problem in all areas where the state has delegated its executive and administrative function to administrative organs ^{which} are entrusted with applying the law. We arrive thus at that trite truth that the efficiency of the system of compliance in any legal order is not only dependent on the availability of judicial sanction and enforcement (the existence of which, in the Community, is represented by the "all or nothing" effect) but also ^{on the} effective mechanism for monitoring, supervising -- policing -- compliance and bringing infractions and infractors to book.

The rise in administrative law litigation in general is pertinent since for the purposes of our analysis we may regard the Member States (when charged with executing Community law) as agents of the Community. It should not therefore come as a surprise if in the Community as well there will be large scope for "misapplication" of the law and policy in the charge of the Member States. This danger of "misapplication" might be rendered even more acute in the Community system since the actual

¶ Even more crucially states charged with applying the law are often its objects.

administrators are usually removed from the sources enacting the law —————> which they are entrusted ^{with applying} and since often this law might be considered in conflict with national priorities at least as seen from the perspective of the national administration. ¶

It will thus be reasonable to expect a correlation between any growth in Community law and Community obligations ^{imposed} on Member States, ^{and} the measure of non-compliance and the problems of supervision. My purpose in this chapter will be in the first place to develop some categories or at least a taxonomy by which to analyse the issue of compliance. In the second place I shall seek to illustrate empirically how the problem of compliance resulting from this "maturing" of the system, has become of such magnitude as to emerge as an important item on the Community agenda. Finally I propose to discuss some of the legal-political dimensions of this problem and raise some points relevant to a possible solution.

The categories of non-compliance

In order to understand better the problem of non-compliance I think it is necessary in the first place to analyse with greater accuracy the relationship between the Member States and Community norms. This relationship may be broken down into four phases of adoption, implementation, application and enforcement. Infraction, and hence policing, must take place as regards all three final phases - implementation, application, and enforcement.

Adoption

This phase concerns the process whereby the Community institution in cooperation with the Member States come to adopt the legal measure or policy. We discussed this process at some length in preceding chapters but I shall highlight certain aspects which I believe ^{are} relevant to the discussion of compliance.

Implementation

Here we are concerned with those norms -- such as the directive -- which require that the Member States introduce the Community measure into their municipal legal order. This is the first potential point for non-compliance with Community law.

Application

Here we are concerned with the correct administration of, and compliance with, Community law deriving either from direct sources such as the Treaty or regulations or from implemented measures.

Enforcement

The correct and effective application of Community law requires that violation of the law at the national level will be met with adequate

remedies. Correct enforcement must be attained both by positive governmental action and by making, where relevant, adequate remedies available to the individual. It will also depend on national judicial compliance with Community law and processes. This is important since in case of infraction it involves ^{the} policing not only of national administration but also of independent judicial organs.

This taxonomy of implementation, application and enforcement gives however only the first elements for understanding the problem of compliance. It is necessary to develop three further categories of analysis.

"Pre" and "post" litigation non-compliance

Earlier in the study I explained that one of the lacunae in the full realization of the "all or nothing" effect is the possibility of Member States to disregard judgments rendered by the European Court of Justice in direct jurisdiction before it (a possibility not open to them under the 177 procedure). In analysing the problem and examining the practice of Member State compliance a distinction thus must be drawn between those infractions taking place at any one of the phases before litigation and those involving a failure to execute a judgment of the Court of Justice either given directly, or indirectly through a judgment in a similar case.

The distinction is important since whereas prelitigation
——> involves fully the problem of monitoring
and supervising —————> non-compliance

a much more transparent infraction, brings
non-compliance into a more profound category. Apart
from bringing a second action for failure to fulfil an
obligation (namely the obligation under Article 171 EEC
to obey the Court) there is not much that can be done
on the judicial level to remedy this latter type of
infraction. In this sense post-litigation infraction
is more serious. It highlights the still existing
weaknesses in the entire system of compliance.

Legislative, executive and judicial non-compliance

Non-compliance might occur at the instance of
national legislatures, executives and judicial organs.
Legislators may fail to implement Community law or enact
law in violation of Community law. —————>
—————> Executives with their wide administra-
tive discretion might equally engage in wrongful
application or even non-implementation and Courts might
disregard or misapply the and/ procedures or the substance of Community
law. Dealing with non-compliance by each of these organs
may invoke different considerations.

Defiance, evasion and benign non-compliance

The last element which may be useful in the analysis
of non-compliance is probably the most subjective and

thus the most difficult to apply with accuracy. Here I am concerned to differentiate the openness of, and motivation for, Member State non-compliance.

At the two extremes we may distinguish between defiance and benign non-compliance. Defiance occurs when a Member State through one of its constitutional organs decides deliberately and openly not to comply with Community law. In the pre-litigation situation this might occur with a deliberate failure not to implement Community law - especially directives; in a decision not to apply Community law in force^{2/} or in a failure -- especially by Courts -- to enforce Community law^{3/}. It might occur in the post-litigation case where either a government defies a Court decision^{4/} or when a Court defies the European Court.^{5/}

By contrast benign non-compliance occurs where there is no deliberate decision not to comply and the infraction is the result of neglect, disinterest, administrative or legislative difficulty or simple misconception. The number of cases of pre-litigation benign non-compliance is probably large but once the attention of the state is invoked the infraction is remedied -- usually without recourse to the full 169 procedure.

Surprisingly perhaps, I would suggest that benign non-compliance might occur even in post-litigation cases that is in failure to comply with a judgment of the Court.

As we shall see there have been in recent years several

of the Court condemning her for failure to implement directives. I regard at least some of these cases as benign since they do not result from an Italian decision to defy the Court and the Community but are due to the objective parliamentary and administrative difficulties of legislation and decision making in that country. These issues will be discussed further below.

A more complex situation is the intermediary case which for convenience I shall call evasion. Here we are concerned with deliberate infraction but not going as far as open defiance. The difference is that whereas in the case of evasion the Member State, or an agency thereof, do seek to evade their obligation under Community law they will not defy an open challenge by the Commission -- or eventually the Court -- if discovered. Many of the infractions under Article 30 and 36 (EEC) probably come under this rubric. Likewise after a condemnatory decision by the Court there may be evasive compliance; either by the state itself^{6/} or even by the national courts.^{7/}

8. The Quantitative Challenge - An Empirical Analysis

We may now approach the actual manifestation of these issues in the Community. First I shall set out in an a-priori manner the emergence of the quantitative growth in ^{legislation.} I shall then try to trace through an examination of the available statistics^{8/} the extent to which

the growth in Community activity is matched by similar growth of non-compliance with the attendant problems of monitoring and supervision.

So far we have refrained from discussing directly the various legislative tools and sources of law available in the Community. Using the terminology of the EEC, —————> the Treaty distinguished among three principal binding tools. These are the regulation, which is generally binding and directly applicable; the decision, which is binding only on its addressee; and the directive, which is binding as to the result to be achieved upon the Member State to whom it is addressed but leaves national authorities the choice as to the form and methods of implementation and introduction into the municipal legal order. All measures, if conforming with certain prescribed requirements may have direct effect.^{9/} It is clearly regulations and directives which are the main general legislative instruments. To be sure, the doctrine of direct effect as applied to directives has blurred some of the distinctions between the two. But direct effect of directives remains exceptional^{10/} and the instruments maintain their substantive distinction. The choice of instruments is determined in the first place by explicit provisions in the Treaty. In some cases the Treaty is neutral -- speaking of "measures"^{11/} to be adopted; in others specific, giving

the Council and the Commission choice between regulations, directives^{12/} and decisions.^{13/} In other instances it stipulates the use of a directive -- noticeably in dealing with the general provision for approximations and harmonization of laws, one of the principal instruments for effective integration.^{14/}

The directive is a more subtle tool than the regulation: it is mindful of the social and political fabric to which laws belong and the intricate relationships which frequently operate between apparently disparate rules. By imposing on the Member States the duty as to the result to be achieved but allowing them to find the best methods of internal implementation, the framers of the Treaty were presumably making allowances for the disadvantages of fully centralized legislation which, although being generally binding and directly applicable and thus more likely to produce direct effect, could produce disruption in national systems.

The price to be paid for the choice of directive as a tool lies in the efficacy of its translation into binding law. For unlike the regulation, which can come into effect immediately, the directive, by definition, has to give a measure of time for Member State adjustment and -- apart from the exceptional cases where directives will produce direct effect -- implementation depends on Member State compliance; it is this last link which exposes the main quantitative challenge.

To be sure, the systems of judicial review and the principles of normative supranationalism provide for legal remedies in case of failure to implement a directive. But before the Commission -- one task of which is to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied"^{15/} -- can take legal action against a recalcitrant or dilatory Member State, it has to be cognizant of non-compliance. To be cognizant of non-compliance it must have effective monitoring mechanisms. In the retroactive analysis we noted the role of the individual as a guardian of the Treaty achieved by the decentralized component in the Community's system of judicial review.^{16/} But the individual can come into direct play only in respect of measures which produce direct effect which is very often not the case in relation to directives or in situations where the directive has already been incorporated into national law. The Commission remains itself the main guardian of implementation of directives.

The magnitude of this problem can be gauged by reference to the numerical explosion in the number of directives. In 1970, 28 directives^{17/} were in force. Ten years later it would appear that within the legal order of the Community there are no less than 700 directives in force.^{18/} Even on a dogmatic

assumption of only one national measure to implement each directive, in a Community of Ten this would mean that the Commission has to monitor the introduction of 7,000 implementing measures. Admittedly these are spread over a number of years but the trend is likely to continue into the future. The Commission has introduced data processing equipment to try and fulfil this task. It has also introduced, in most directives, a duty on the Member States to report on implementation measures, failure of which could trigger enforcement proceedings under Article 169 EEC. But even should the Commission eventually be able to put tags on all the implementing measures three further problems immediately arise.

Firstly the sanction against non-compliance depends on direct judicial adjudication before the European Court of Justice -- albeit after a conciliatory phase in which the Member State is given time to put its house in order. The prospect of a flood of actions which may congest and even choke the Court is no less alarming than non-implementation especially since the Court is already working under a heavy case load. A further increase of such case load will not only threaten the Court's efficiency but also dilute its normative-constitutional role as a supreme court.^{19/}

In the second place, even on the optimistic assumption that the Commission would indeed be able to monitor the introduction of implementing measures the fact of implementation alone would not in itself be sufficient to ensure effective application and enforcement. The national legislative act might after all misconstrue the enabling directive. Admittedly, the implementing measure can be judicially reviewed against the enabling directive at the instance of individuals^{20/} affected by it. But often in order to test the validity or legality of an implementing act the individual would first have to violate it so that the validity may be contested, a risky course of action which many individuals would be loath to take.^{21/} In addition the Community origin of the implementing act may be oblique^{22/} so that the individual is not aware of the possible ground for judicial review. Thus correct monitoring of implementation does not only mean making sure that internal legislation was brought in but that it actually implemented the directive correctly. The magnitude of this substantive task -- for it does not merely involve counting -- cannot be exaggerated. It is probable that the Commission simply has not got the necessary technical staff to engage in this exercise on a systematic basis.

In certain classes of directives -- say in the

agricultural field -- the Member States are required to submit the draft of the implementing measure to the Commission for commentary. In some instances questionnaires are sent out. But even this would not completely solve the third ^{and final} problem since even a well drafted national implementing measure has, as we saw above, to be applied and then enforced. In the Community system this is done by national administrative authorities which creates a new tier of potential misapplication which in turn would need Community supervision.

Monitoring the implementation of directives into national law, controlling the conformity of the national measure with the directive and supervising execution are problems which are inevitable consequences of the system. The Council and Commission are primarily legislative organs, the execution of their positive policies being entrusted -- unlike many federal states -- to the Member States. Indeed the quantitative explosion may be the result of a legislator not fully responsible for the execution of policies.

The emergence of the compliance problem

In Table 1 I have consolidated all publicly available data regarding the usage of the infringement procedure under Article 169 EEC. Despite the selectiveness and limitations of this data which I shall explain below, I believe this compilation may be a useful indi-

Non-compliance - general data.

* Introductory + case dismissed: cases underlined:	B - benign
	E - Evasive
non compliance:	D - default

cator of the growing problem of compliance. Apart from the basic numerics I have tried to distinguish between cases concerning non-implementation and cases concerning wrongful application; Further, I have tried to indicate, very tentatively, cases involving benign, evasive and defiant non-compliance. On the basis of this table I shall attempt, through a closer analysis of certain detached elements in the table, to draw conclusions on the general trend of non-compliance, the efficacy of the monitoring and supervisory machinery, and finally on some of the legal and political consequences of these trends.

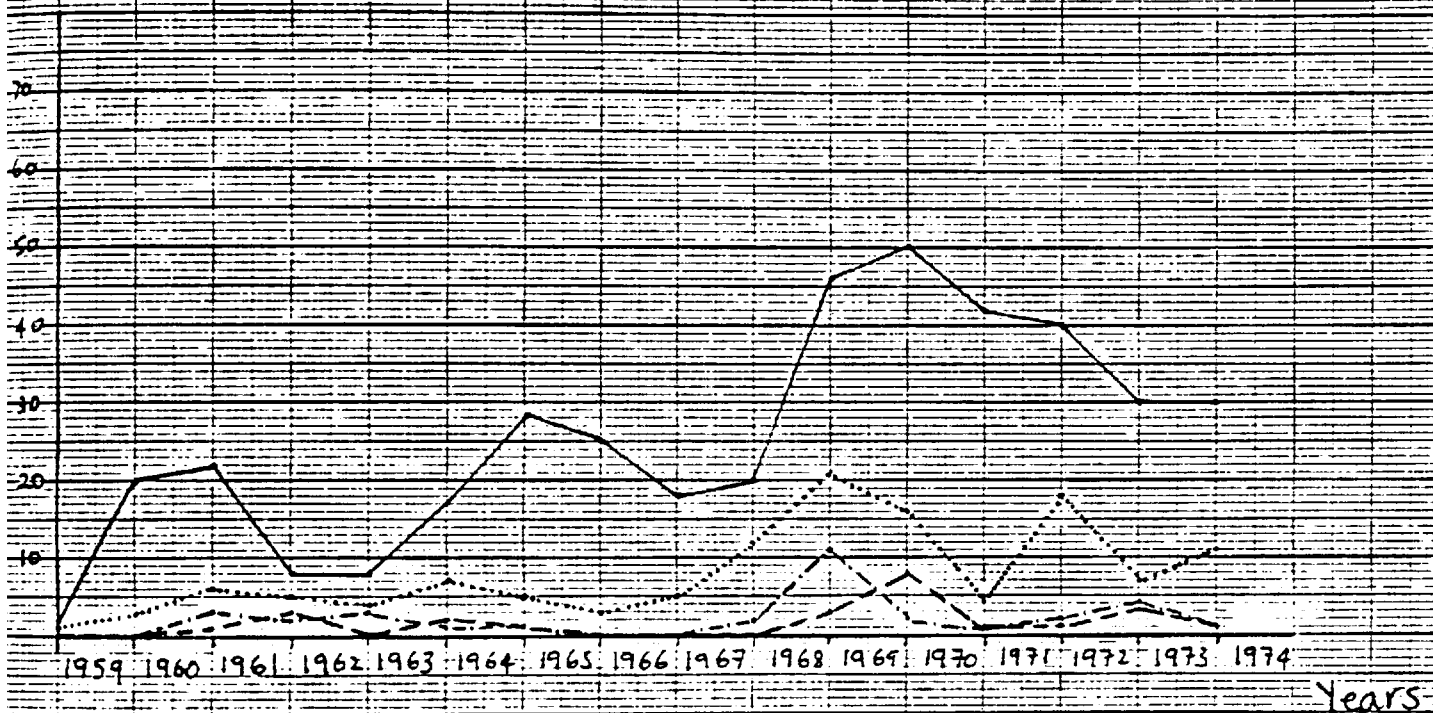
Table 1

The most noticeable trend is a rather dramatic growth in the numbers of infringement procedures in all phases including final judgments by the Court. This is illustrated in Table 2.

Table 2

Table 2

Infringement proceedings 1959-1974



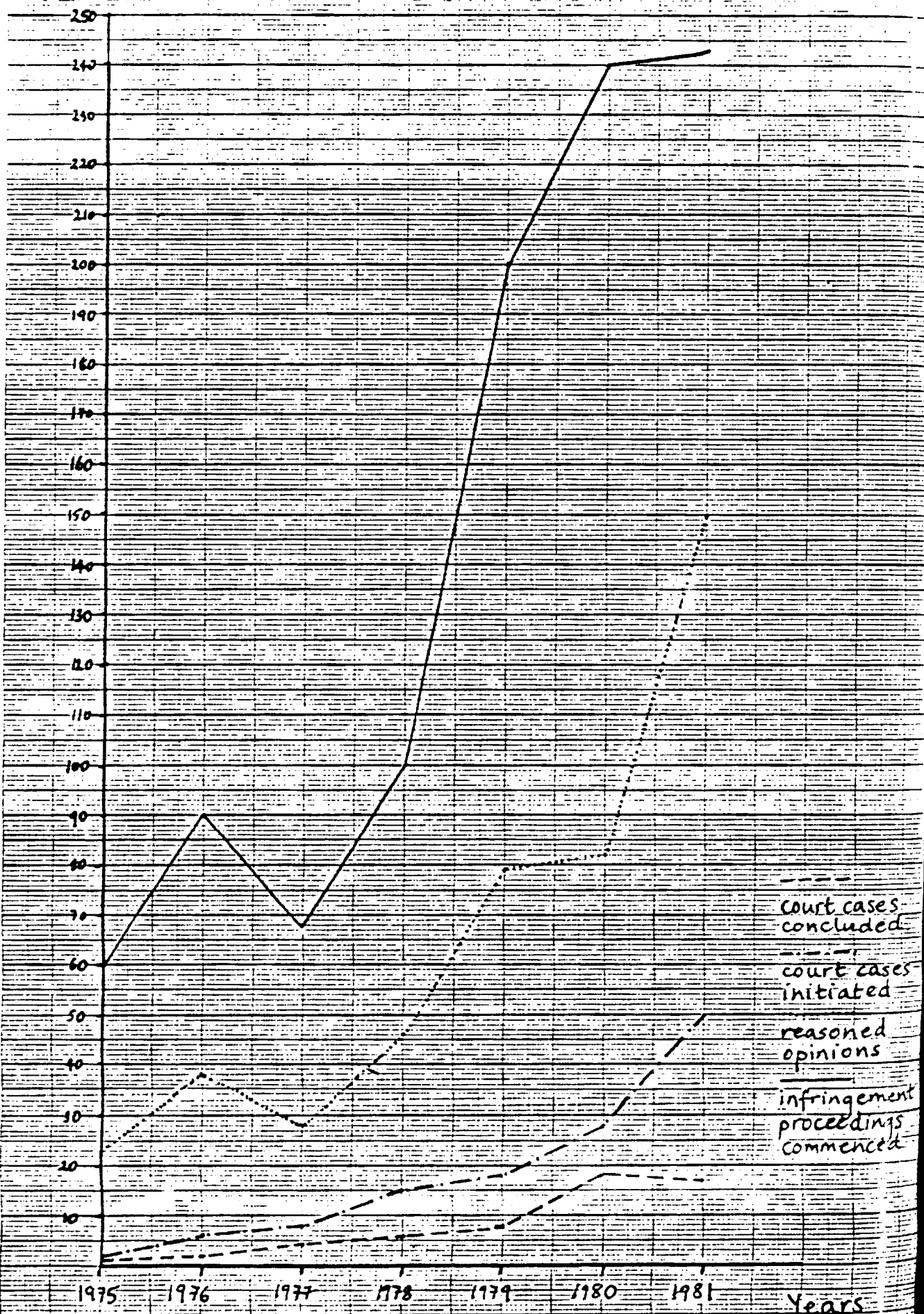
court cases concluded.

court cases initiated.

reasoned opinions.

infringement proceedings commenced.

Infringement proceedings 1975-1981



We must treat this graphic presentation with the caution that all statistics demand. Firstly, it does not reflect the full picture of non-compliance. The basic figures in table 1 refer only to infringement proceedings under Article 169. Through the jurisprudence of the Court under Article 177 we know that many cases of non-compliance occur which are not caught by the 169 procedure. In addition, the apparent growth might not represent simply a growth in non-compliance but either a better monitoring system by the Commission and perhaps a policy of enforcement which is more aggressive or both. But even with these qualifications it is clear that the problem of faithful compliance and of Commission supervision is growing or at least has become more visible and hence, politically, more significant. If the figures simply reflect a more aggressive Commission this must be at least partially explicable by a perception of growing non-compliance by that organ. I estimate that the problem is a combination of objective growth and a change in policy.

The broad correlation in the increase as regards all three phases in the infringement procedure (warning letter, reasoned opinion, initiation of action) is understandable. (Note however that the statistics of initiation of actions will relate to reasoned opinions brought in previous years!). We further notice that only a percentage of infringement proceedings commenced actually result in a reasoned opinion; that only

a percentage of reasoned opinions have to go to trial and only a percentage of cases brought to trial result in judgment and are not withdrawn earlier when the Member State corrects the infringement. This means that the mere commencement of the infringement procedure is enough to bring a significant number of infringements to an end; that of those which remain, the reasoned opinion reduces the infringement further and that once the Commission actually brings a case this drastic action in itself is sufficient to terminate the infringement in yet a further substantial number of cases. Thus in the period 1975-1981 the initiation of infringement proceedings was sufficient to terminate the infringement without the necessity of a reasoned opinion in 57% of the cases. Of the reasoned opinions on average only 25% of cases had to go to trial and for those cases brought to court the Member States remedied the situation before the proceedings took their full course in 55% of cases.

Table 3

Elimination of Infringements by the 169 Procedure

	percentage of infringement proceedings going to reasoned opinion	percentage of reasoned opinion going to trial	% of trials taking full course
1975	38	9	50
1976	42	16	33
1977	41	28	50
1978	46	33	40
1979	40	22	44
1980	34	34	64
1981	61	33	34

Note that the figures in each of the second and third columns will relate to infringement proceedings or reasoned opinions of previous years. The overall picture however is not affected.

These average figures are interesting since they suggest the relative effectiveness of the procedure. After the first phase of the proceedings there is a large drop in cases going to the second phase of reasoned opinion (slightly over 50%). An even larger drop is registered in the number of cases going from reasoned opinion to legal action (75%). A similarly impressive percentage of cases (55%) is settled after the bringing of the case so that no judgment is needed. The success record of the Commission is extremely high so that the chances of "acquittal" for Member States are marginal. Of the 80 or so judgments delivered between 1960 and 1981 under 169 proceedings, the Commission "lost" in only 8 instances. The threat of a condemnation by the Court seems thus

real enough. The figures are even more dramatic if we consider the pre-169 procedure. The Commission opens a file in every instance in which it suspects an infringement or when a complaint ^{is received} and a prima-facie case is established. These files are subject to informal negotiations before the formal procedure is contemplated. In 86% of cases the matter is settled in this informal way. Overall, only 1% of these files reaches the final stage of a Court judgment.^{23/}

This apparently encouraging statistical analysis of the deterrent and/or conciliatory effect of the 169 procedure with all its phases must however be qualified. We have dealt with average figures for a block period of 6 years. On its face, if we examine the last few years we can see in table 2 that the increase in the number of infringements going to trial is not matched by a similar increase in the number of judgments. This might suggest an even growing efficacy in the deterrent effect of judgments.

In fact the statistical data is misleading. The reason why the number of judgments seems not to have grown in proportion to the increase of cases initiated is that the Court's numerical burden has increased, and the waiting lists have grown. In fact less rather than more cases are being remedied by the Member States before judgment.^{24/} —————> In other words the Member States appear to be less concerned with the possibility of a condemnation by the Court. Here then

we have the first indicator that the problems of faithful compliance are being exacerbated not merely because of the quantitative increase of Community law but possibly also because of a deterioration in the attitude of the Member States -- in this instance of rather subtle nature -- towards the rule of law in general and the sacrosanct character of judicial decisions in particular. In fact I shall be arguing below that these two processes of quantitative increase and decline in respect to judicial adjudication are partially inter-linked.

Earlier we noted the dramatic rise in the number of directives during the 70s and in particular the middle part of the decade. If our hypothesis of a causal connection between legislative growth and non-compliance is correct we should find a correlation between that growth and the proportion of infringements concerning non-implementation rather than wrongful application. This cannot conclusively prove the hypothesis but absence of such correlation would refute the hypothesis. The figures are rather interesting. If we take the overall figures of judgments for 1973-1981, of the 52 judgments decided by the Court non-implementation accounted for 23 whereas non-application for the remaining 29. The percentage of non-implementation constitutes thus a relatively high proportion of all judgments considering that in the previous decade non-implementation was hardly an issue at all. The figures for infringements give a

further insight. Whereas in the years 1975-1978 the number of infringement proceedings commenced were divided roughly equally between implementation and wrongful application (with a slight predominance of the latter), since 1979 non-implementation accounts on average for 75% of all infringement proceedings commenced. (See table 4). There is then a noticeable increase in non-implementation cases which is maintained in roughly similar proportions for the second phase of the reasoned opinions. Whereas the overall increase in numbers is, as indicated above, explicable at least partially as a result of a more aggressive prosecutory policy of the Commission, the growing proportion of non-implementation must find explanation by other factors. First and foremost is the simple objective fact that the period of increase in question corresponds largely to the period in which numerical growth in directives will have worked itself into the system and dates for ^{implementation} will have fallen due. Secondly, and far more problematically, is the fact that the visibility of non-implementation as distinct from non-application or wrongful application is far higher. The Commission's ASMODEE data base^{25/} can cover most cases of non-implementation especially since many directives contain a reporting requirement. For cases of wrongful application the Commission's technology must depend on a relatively haphazard system of complaints

Table 4

Percentage of cases of non-implementation and non-
application among warning letters sent out by Commission
(phase 1, 169 procedure)

	non-implementation	non-application
1975	55	45
1976	33	66
1977		
1978	40	60
1979	75	25
1980	75	25
1981	75	25

from third bodies and on a far from perfect internal supervisory system. The upshot of this is that whereas we can safely conclude that non-implementation is a growing problem, we cannot conclude that non-application is declining. Non-application is simply an iceberg, the magnitude of which remains so far unfathomable.

The statistical data may also be useful in evaluating the significance of infringements in accordance with the taxonomy of benign, evasive and defiant non-compliance. More than ever must we be careful in this exercise; a correct evaluation is possible, if at all, only on the basis of a case by case analysis which is beyond the scope of this work. A first general indicator may however be desirable even in the statistical data. Whereas ———> the cases of non-implementation have in the last few years clearly predominated in the first stages of the infringement procedure when one examines actual cases which result in judgment this predominance disappears. On average a higher number of judgments concern non-application than non-implementation. This may therefore suggest the benign, or at worst evasive, character of non-implementation and a greater willingness of the Member States to rectify non-implementation when alerted to their delict by the Commission. Wrongful application could probably be more easily inserted into the evasive and defiant categories.

Defying the Court

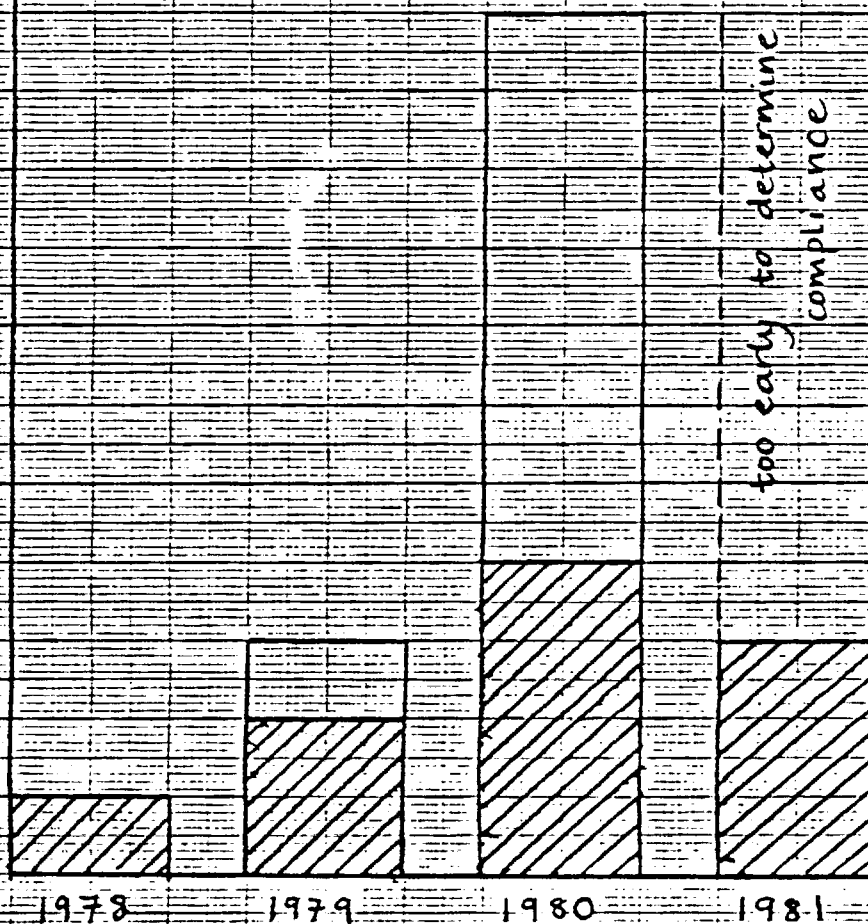
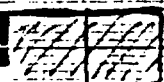
So far I have examined instances of non-compliance in the prelitigation phase where the judgment of the Court was considered as the ultimate sanction. I underlined several times the fact that the quantitative growth of the problem was partially objective but partially an unmasking of a pre-existing problem. As regards post-litigation non-compliance, at least in relation to cases concerning the direct jurisdiction of the Court, we are definitely confronting a relatively new phenomenon. In the past the high measure of obedience accorded to the European Court of Justice has always been one of the distinguishing features of the Community system. The celebrated Art Treasures cases have been usually cited as an exception proving a general custom of observance. Since 1978 we begin to detect what may be regarded as the first creaks in this edifice of obedience. Here as well we have a process of growth. I should immediately emphasise that the problem is far from dramatic, but unlike cases of infringements, defiance of the Court can be very damaging even if it occurs in a limited number of instances.

Table 5

Table 5

The proportion of non implementation and non application among instances of non compliance with judgements rendered by the European Court.

number of cases



non application

non implementation

Of all infringement cases in which judgment has been given since the first enlargement in 1973, in 18 instances Member States have failed fully or partially to comply with the judgments. (We should note here that many of these cases concern Italy; the national breakdown will be discussed later). Of these 18 cases over half concerned non-implementation issues - i.e., Member States failing to implement a directive even after judgment for failure to fulfil an obligation. Of those 10 cases I would suggest that at least 8 could be classified as benign: in other words not involving a political determination to disobey the Court but rather the same factors of political and administrative paralysis which caused non-implementation in the first place probably caused non-compliance with the subsequent judgment. If I am correct in this explanation it might appear that the problem of non-compliance with judgments is less acute than the figures at first suggest. This however would be a dangerous conclusion for three principal reasons.

Firstly of the 8 cases concerning non-compliance with a judgment concerning wrongful application of Community law, only 2 could probably be classified as benign, the rest remaining cases of evasion or defiance.

Secondly we have to consider the negative symbolic effect and the erosive consequences to the authority and credibility of the Court which any non-compliance -- with whatever motive -- may have. Indeed from this

if even a Court decision cannot bring about the faithful implementation of Community law a wide lacuna opens in the legal order. This is especially acute when one considers the contagious effect of non-compliance. Non-compliance by one Member State might well invite non-compliance by another.

Finally, in the category of post-litigation non-compliance, perhaps even more than the pre-litigation category, some of the most clamorous instances occurred in the context of cases coming under actual or potential preliminary ruling procedures. The recent defiant declaration of the German Government in the Butter Ships case^{26/} is one glaring example of non-compliance by the executive and the Cohn-Bendit case^{27/} as well as the decision of the Bundesfinanzhof^{28/} -- both cases defying the European Court's jurisprudence on the direct effect of directives -- are cases of equally worrying defiance by national courts.^{29/} Indeed these two sets of cases may be taken as possible examples for the contagious effect of non-compliance. The Bundesfinanzhof may certainly have felt freer so openly to defy the ECJ with the precedent of the Conseil d'Etat already established. The high respect which is accorded to judicial decisions in, say, the German and British systems must be severely undermined by disobedience occurring, say, in France and Italy. Thus,

one may wonder whether the Government of the Federal Republic, hitherto in the frontline of obedient states would have broken its record in the Buttership case without the precedent established by the French in the Mutton and Lamb saga. This may be an opportune point to turn and examine the wider legal-political context of non-compliance.

c ~~my~~ The Paradox of Non-compliance

To be sure in one sense the maturing of the Community system has rendered the non-compliance issue predictable and inevitable. In another sense my earlier analysis of normative and decisional supranationalism presents a dilemma, or even paradox, in the context of the non-compliance discussion.

The approfondissement of normative supranationalism has distinguished the outcome of the Community decisional process from that of most other international organizations. In many of these international "law" making fora the participating states may accept relatively "lightly" a convention even one including new international obligations since these normally will be subject to national ratification before they become binding on the signing states. Further, a regime of reservation is also available before the obligations are to become binding on the parties. In dualist states there is the added "insulation" of national parliamentary implementation. The Council of Europe

boast impressive lists of international treaties; many of these however remain unsigned, unratified or subject to reservations by the participating states. By contrast, in the Community, although the process of decision making has become increasingly "diplomatic", once decisions are taken, once proposals are accepted, they have in most cases the immediate binding effect either on the states and, depending on their direct effect, very frequently even within the states. The immediacy of this binding effect might, as I have argued, have contributed to Member States' increasing degree of caution in their Community law making since they do not have the "escape mechanisms" available in the public international order. Indeed, as I suggested above this factor may have been one powerful reason for the decline in decisional supranationalism. But here lies the principal paradox of Community non-compliance. If the Member States, through this process of decline, have achieved jointly and severally, a position of dominance in all phases of Community decision making why is it that there is this increasing trend of non-compliance? Each Member State may check the eventual obligation at each of the four crucial stages in its adoption: Political initiation (European Council); technical elaboration (working groups, groups of experts, COREPER); adoption (veto power in Council) and subsequent secondary elaboration (management and other Committees). In this

extended and laborious process ample opportunity is given to each Member State to weigh the consequences of adoption, to foresee eventual implementation or application problems be they political or technical and to amend, or even block any unacceptable proposal. With all this "foreplay" it does indeed seem strange that after eventual -- often extremely protracted -- adoption "consummation" should seem to be posing such difficulties. The deliberate dismantling by the Member States of the supranational decisional structures was executed precisely for this reason: to prevent a Member State having to face a normatively binding measure the making of which it could not control. Why then the implementation/application problems? There can be no single answer to this problem. Moreover the explanations which I shall offer must, in the absence of further (methodologically complex) research, be regarded as tentative even speculative.

In dealing with this paradox I propose to divide the decisional process into three primary compartments:

- The national,
- political and administrative process in the pre-adoption phase
- the decisional process within the Community itself leading to adoption
- the national political and administrative process in the post-adoption phase

Naturally these are not watertight compartments. On the contrary the process within each of these affects the others and all three have implications for eventual faithful compliance.

Judicial activism: Law without political consensus

A first step in solving the paradox of non-compliance may be made if we return to the distinction drawn in the empirical analysis between implementation and application. If we isolate the cases of wrongful application -- the number of which, at the stage of judicial adjudication -- is equal or even superior to non-implementation -- we shall see that a great majority of them are traceable back to breaches of positive law in the making, or at least perfection, of which the Member States did not partake. I am referring to decisions of the Court of Justice as a source of law and obligation. So far in our analysis of judicial activity I have concentrated on the general constitutionalizing decisions of the Court. The Court's dynamism has not however been confined to these general questions of "federal" structures. In treating the substantive obligations contained in the Treaty the Court has frequently been motivated by a vision of the evolution of the Common Market, the purity of which although traceable to the Treaty was not shared by the Member States years after. Thus, Member States have found themselves faced with an increasing number of substantive

Treaty obligations to which direct effect was extended and the scope of which was judicially widened. By contrast, derogation measures -- principally those relating to the fundamental four freedoms^{30/} -- were given a restrictive interpretation by the same Court. Leaving aside the question of the legitimacy of the interpretative techniques adopted by the Court in this process, this substantive corpus of obligations represents a source of positive obligations in the elaboration of which the Member States did not fully partake. In other terms the "acceptability" factor which ^{was} one of the positive aspects in our analysis of consensus decision making does not exist here.^{31/} (To be sure they all accepted the Treaty but we have already noted that, to put it at its most neutral, the understanding of the character of obligation which the Treaty imposed was different ^{from} the post-1963 conception of the Court). Prominent among areas of judicial activism has been the field of free movement of goods and the interpretation of Articles 30 and 36. The concept of a measure having an effect equivalent to a quantitative restriction on imports (or exports) has been completely remoulded by the Court. Article 36 has, at least until recently, been almost interpreted out of existence. Further, unlike say the area of free movement of persons where the Court has been equally creative, the free movement of goods comes frequently into conflict with Member State economic or commercial interests. Thus in relation to

surprised to learn that most non-application cases relate to this subject matter. The non-compliance paradox does not thus arise in this context.

National pre and post adoption process - Problems of non-compliance

What then of the growing area of non-compliance namely the non-implementation of directives. Here, after all, the Member States do partake closely in the process of adoption. We must therefore return to the decisional process itself with a view to identifying possible elements which might explain how despite consensus decision making and national technical and political control non-compliance remains problematic.

The national preparatory phase in which Commission proposals are formulated and then negotiated is not much researched at least by legal scholars; partly because of the difficulty of penetrating bureaucratic practices, partly because of lack of research interest, partly because it has not been perceived as having any legal dimension. We may consider two ranges of problems in national preparation which might have subsequent negative effect on faithful compliance.

At the level of administrative preparation much will depend on lateral coordination between different governmental departments which might be eventually affected by a proposed Community directive. In other words it will not be sufficient for the immediate department concerned to consider alone the ramifications of a proposal with a view to identifying potential national obstacles to implementation and feeding these

national departments must be equally concerned since it is rare that a measure in whatever field, will not have consequences going beyond its primary subject matter. Typically in relation to almost any proposal there will be an interest, apart from the principal department concerned with the subject matter, by the departments of foreign affairs, finance, and justice. If subsequent compliance problems are to be avoided a high measure of lateral coordination will thus be necessary. Member States differ sharply in this respect. A recent study on the French administration^{32/} reveals a highly coordinated and relatively efficient preparatory system organized within the framework of a special interministerial governmental organ directly answerable Denmark has an equally efficient if less formal structure, to the prime minister's office. By contrast in Italy this coordinating function is as yet embryonic. In the Italian governmental structure where ministerial files are distributed among a host of different coalition partners there is a tendency -- felt in national administration as well -- towards lateral fragmentation. The absence of a proper prime minister's office only exacerbates this fragmentation. As a result I would suggest that despite the possibility of a check by Italy of the Community decision making process, she may simply be unable to identify with precision those problems which might later occur. Other Member States -- say, Belgium, may find themselves somewhere in between this Franco-Italian dichotomy.

A second dimension of the national preparation concerns the measure of political control. Here it may be useful to compare Denmark with Italy. Denmark^{33/} offers perhaps the most advanced model of direct parliamentary control of the national input into the Community decision making process. Although the system is far from perfect it does yield two benefits. Firstly, the Danish ministries will have an internal incentive to prepare their brief thoroughly because of this additional layer of public scrutiny. The typical question of the Danish Parliamentarian will be addressed to the possible impact Commission proposals might have on and within the country. This preparation will help highlight potential problems of implementation which may then be raised in the Community process. Secondly, the Danish Parliament having partaken in this scrutiny exercise will be less reluctant or suspicious towards the output of the Community organs and more willing to implement them in accordance with their obligations. The much weaker Italian parliamentary involvement^{34/} and control will naturally yield opposite results. Parliament simply will not have the political incentive or confidence to accord priority to Community directives.

We can at this point see that although the division of the decisional and implementation process into three elements is analytically useful in enabling us to underline particular problems in relation to each element,

the national preparation before adoption will be tightly connected to national implementation after adoption in the Community.

If we focus then on the national situation in the implementation stage (i.e. post adoption) once again we will find differences among the Member States which will help explain the paradox of non-compliance. —————>

—————> The most important element is probably the constitutional position regarding implementation. Here it may be useful to compare the United Kingdom; Italy and France. In Italy, constitutionally, Parliament itself has to enact every implementing measure. Considering the short life of Italian legislatures, the increase in the number of directives and, as a result of the pre-adoption elements, the lack of interest towards the Community output we have a sure recipe for long term delays. By contrast, in the U.K., the initial constitutional arrangement of British accession enables the Government to adopt many implementing measures by statutory instruments only with Parliament having an infrequently used veto power. Clearly the whole range of problems which full fledged parliamentary adoption involve are avoided here. France, with its mixed allocation of legislative competences, stands somewhere in between.

We have found therefore, within the national systems, certain elements which might help explain, despite consensus decision making, the non-compliance paradox. But

even in the Community process itself certain elements might contribute to subsequent implementation problems.

The Community decisional process - problems of non-compliance

Consensus decision making is undoubtedly one prevailing characteristic of the Community process. The potential for control by the Member States which flows from this is, as we saw, at the core of the non-compliance paradox. It is however possible to identify several factors in the Community decisional process itself which may help explain why, despite the consensus, compliance problems might arise. These factors, ranging from the general to the specific, can represent no more than an overall check list. In relation to each individual case a more specific analysis ^{would} become necessary.

- a. Clearly one fundamental aspect of the decisional process which might well have a basic influence, albeit indirect, on subsequent compliance, is the fact that the Commission as initiator and proposer of legislation is not, except in few areas, subsequently responsible for implementation and application. It is true that in relation to municipal legislation, national parliaments at least in the formal sense, do not —————> have such responsibility. But we are well aware that for the most part national legislation almost invariably emanates from governmental

departments and the civil service with the backing of the elected executive and that the parliaments initiate legislation very rarely.

National

legislators are, so to speak, sandwiched by the executive/administration which first propose and then apply the law. This is particularly true for much of the detailed economic and commercial legislation which is similar to the bulk of Community activity. This asymmetry in the function of the Commission (when contrasted with national administrations) may explain a certain insensitivity to the entire problem of implementation and application. This is evidenced for example in a certain over-emphasis on numerical output and for less concern with effective compliance. Certainly this problem is mitigated by the pervasive presence of national administrations which can contribute that realistic dimension to this otherwise asymmetrical process. But this mitigating effect is neutralised by two factors: Firstly, the Commission often determines the legislative agenda. A numerical escalation might overwhelm the national representatives which are required, by the rules of the system, to deal with all items on this agenda. Secondly, the national representation at the Brussels level is frequently fragmented, each national department dealing with the specific subject matter allocated to it. The overview, the perception of size and quantity, remains essentially in the Commission's hands. Although this trend of legislative fever has been checked during the Jenkins' presidency,

the excesses of the mid-70s.

- b. There has been a tendency by the Commission at least in some fields to draft extremely detailed directives -- directives which thus resemble final legislation such as a regulation rather than a determination of ends as envisaged by the Treaty.

In itself this phenomenon highlights once again the dialectics of the decisional process and the issue of compliance. A vague and open-ended directive gives a Member State wide latitude for wrongful application. In addition it prevents the possibility of invoking it by an individual before a national court, a possibility which was central to the system of compliance. The tendency towards the detailed directive becomes thus at least partially explicable. On the other hand this tendency might have two negative effects. First, it might prolongate the actual decisional process within the Community as a simple consequence of the greater detail of the measure. But even in terms of compliance the detailed directive might create problems. Because whereas it is true that the increased detail reduces the latitude for wrongful application it also increases the potential for non-implementation. A detailed directive which is poorly drafted, and it is often suggested that

the legislative techniques of the Community leaves

much to be desired,^{35/} may itself constitute an obstacle to implementation.

- c. A closer look at the functioning of the groups of experts involved at the Commission formulation stage and even during formal adoption of the proposal may add another possible explanation to the paradox. Clearly one of the functions of these national experts is to highlight and then iron out those elements in a proposal which will render its implementation or application in the Member States difficult. For the most part they are concerned with technical and legal aspects. On the whole their contribution, despite the slowing down affect it has had on the decisional process, has significantly improved the quality of proposals and has also improved the potential for faithful compliance. But there remains a weakness or limitation on their potential utility which derives from the inevitable distinction between the technical and the political dimensions of proposals. The experts will be able to iron out most if not all of the technical problems. At the end of their work they might remain with unsolved technical problems which however represent genuine political or policy differences. These problems might be precisely those which later could cause difficulties in compliance.

But, the solution to these issues will be taken

away from ———> the experts and handed to the political fora (and this includes the upper echelons of the COREPER) which will be less sensitive to the technical-policy nuances. Moreover, the solution or compromise eventually adopted might also be influenced by external considerations thereby leaving the differences intact. Strangely thus the most difficult issues might be those which remain unsolved when the proposal is adopted.

- d. This last point leads us to another set of factors which ^{might} help explain the paradox. Although a Member State can theoretically veto any proposal, it is wrong to believe that no political price attaches to such national obstructionism. As we saw in the analysis of the decisional process in chapter 3, "package dealing" (horse trading) has become a common feature of the Community game. A Member State will have "to give" on issue X in order "to take" on issue Y. Failure to observe this etiquette might create political stagnation and precipitate crises. The freedom to veto is curtailed thus by political pressure. It is possible then that within this decisional horse trading, proposals will be accepted by Member States despite internal objections and foreseeable implementation/com-

pliance problems as part of a deal the stakes of which are considered more important. Later however, distance in time and place from such political exigencies, the implementing and applying bureaucracy -- often different from the "compromising bureaucracy" -- might seek ways to "derail" the difficult legislation.

One should add in this context briefly that much of the general secondary legislation is passed within the Committee structure by majority or quasi-majority voting. In these structures the element of acceptability is not present and therefore the paradox does not arise in its acute form.

- e. As we noted, one consequence of the trend towards intergovernmental decisional structures has been the increase of secrecy surrounding Community activity in its preparatory phases. (This secrecy also affects the very issue of compliance. The Commission is increasingly cautious in releasing figures regarding non-compliance precisely because of the diplomatic sensitivity of these data). The possibility of public debate and societal impact by groups which are not formally incorporated into ^{the} decisional structure is thus limited. The European Parliament can only remedy this

problem in an extremely limited extent. Not only because of its lack of decisional influence but even its consultative function is severely impaired because of the Community process. At the moment at which Parliament is able to give its opinions diplomatic bargains will already have been struck _____>
_____> which will not be easily undone. Consequently, pressure groups and social forces which are unable to exert direct impact at the level of Brussels may be instrumental in lobbying _____> at the national level for non-implementation and application.

- f. Last but not least, objective technical deficiencies in directives might impede implementation. Directives may be vague, they may be technically imperfect, the time for implementation might be too short. Even a well wishing national administration might find difficulties ⁱⁿ faithfully implementing the output of the Community decisional process.

The non-compliance paradox - conclusions

It is now possible to attempt a reconstruction of all these elements into one whole. Although the differentiation of the decisional process into 3 -- the national preparation, the Community decisional process and national implementation and application -- enabled us

liance, it is clear that all three form part of one single if complex process. Indeed, what is striking is the interconnectedness of all elements. Some factors remain constant. This is particularly true as regards the constitutional arrangements (e.g., whether the executive can implement directives without a formal and fully fledged parliamentary process) and the general efficiency of the administration. But as regards other elements, we saw how for example political involvement in the preparatory phases, or the measure of lateral coordination within the national administration could affect the ^{likelihood} by which the output of the decisional process will be liable to resistance at the implementation stage. We also noted an even more interesting relationship whereby all three elements combine into an apparent contradiction which so often characterises the Community system and which may be expressed as follows.

The greater the national preparatory input, the more professional the preliminary scrutiny by the national administration and political organs, the wider the involvement of interest groups, so will the decisional process be difficult and the passage of a proposal through ^{the} Community process slow and tortuous. More objections may come to light, more interests will have to be squared. And yet these very factors which might thus contribute to a frustration of consensus making and consequently to frustration in the adoption of

Table 6

Distribution of 169 condemnations by the Court
according to Member State

<u>To Member States</u>	<u>No. of condemnations</u>
Italy	46
France	7
Belgium	7
U.K.	5
Ireland	4
Germany	2
Denmark	1
The Netherlands	1
Greece	0

Table 7

Non-compliance with Court judgments (169 proceedings)
since 1973

Member State

Italy	14
France	2
U.K.	1
Denmark	1
Belgium	1

tives will, if agreement is eventually reached, subsequently contribute to the full and faithful realization of those measures which pass such a mill. By contrast a positive and less insistent national preparation input will ease the decisional process facilitating the attainment of Community objectives as reflected in its legislature programme but will potentially create a danger of non-implementation and hence frustration of the actual realization of the programme. If I may use once again, by way of conclusion, the Danish-Italian example, Denmark which, overall, has perfected interesting structures for dealing with Community proposals, —————> is a tough detailed-minded negotiator verging almost on the obstructionist but also has a record of very faithful compliance. Italy by contrast has a reputation of one of the most Communa-taire Member States instrumental in many a political compromise but with a record of non-compliance (even if mostly benign) (See tables six and seven). second to none. Within the Community apparatus itself a greater emphasis on technical professionalism, a strong drive to have genuine consensus rather than package dealing —————> —————> and longer time given for implementation all represent elements which might simultaneously contribute to a feeling of a less dynamic Community but which at the same time might help true realisation. Graphically these relationships may be expressed in the following two dichotomous situations:

Table 8

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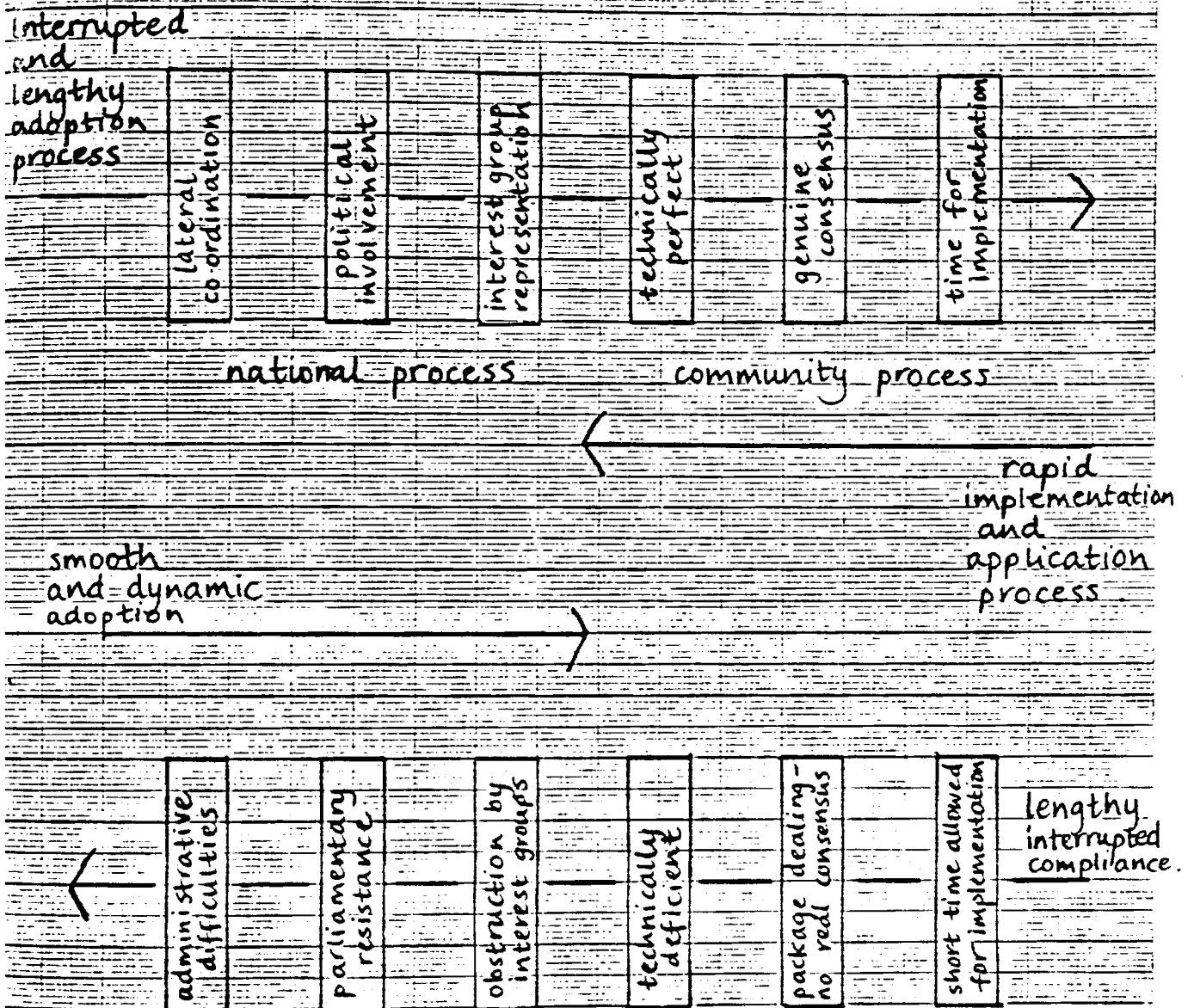


Table 8

Questions of policy

The primary purpose of this study is neither to describe in any detail the Community machinery and its operation nor to make explicit policy proposal for the future. At the same time legal-political analysis may hopefully give some new perspectives which might also contribute to policy thinking. By way of conclusion I will touch briefly on a number of points which might have relevance in the policy discussions of the 80s.

1. Most generally but no less fundamental because of this, must be the simple conclusion that non-compliance -- of whatever category -- should feature high on the agenda of the European Communities of the Eighties.

The collapse of the doctrine of attributed powers has

merely rendered this problem more acute. There would be little purpose in further expansion of Community activity into new fields, if legislation cannot be assured of relatively faithful compliance^{and} if the existing acquis Communautaire is simultaneously eroded because of a failure to observe Community law. Most important in this respect would be further research into the scope of the problem, particularly the extent to which it manifests itself in wrongful application rather than non-implementation.

2. I have insisted on dealing at length with the decision making process as a factor in the non-compliance debate. I have done this not only because this accords with the orientation of the whole study; but also to counter a certain trend in the analysis of the problem. There is the beginning of a tendency to define the problem predominantly in technical terms of supervision and in legal terms of enforcement.^{36/} Solutions are thus sought which would increase the supervisory capacity of the Commission by, say, improved data processing techniques and by a more effective or aggressive prosecutory policy. In the European Parliament diagnosis has tended to focus on the lack of enforcement powers or real sanctions by the Commission or the Court vis-a-vis a violative Member State other than, ultimately the declaratory judgment. Suggestions of fines or withdrawal of Community privileges as a sanction have been mooted.^{37/}

Whereas I do not disagree that there is wide scope to improve the supervisory capacity of the Commission or to give greater bite to the present declaratory judgment (though I doubt the political realism of this latter suggestion), our analysis helps to illustrate the deeper political and structural dimensions of the problem. Detection and deterrence, even punishment are all useful tools in any battle against non-observance of the law. But, I would suggest, on the international level -- even within a supranational structure -- prevention is probably even more important than ^{it is} at the municipal level and within the private law realm. The way towards prevention is inherent in the analysis of the ^{non-}compliance paradox: An improvement in the decisional processes at both Community and national level. Inevitably this process for which there is no rough and ready solution will involve a compromise between the competing values of a dynamic and rapid decisional process and faithful implementation which as we noted could at certain points be construed as being in conflict with each other.

3. In my earlier analysis of the system of compliance (chapter 4) I pointed out several of the advantages of the preliminary ruling as a device for ensuring compliance at the instance of individuals. There may be place for greater utilization of this potential by the Commission. Whereas the doctrine of direct effect of directives has been curtailed by the Court in its recent jurisprudence^{38/} the doctrine remains intact

as regards "negative direct effect", namely an instrument for reviewing wrongful (either non-implementation or wrongful application) compliance by Member States. The policy of utilizing the individual and national courts as guardians could be combined with the 169 procedure. The Commission could give maximum publicity -- especially among interested parties -- to reasoned opinions of the Commission. The existence of a reasoned opinion delivered to Member States might induce 'individuals (which will be supported by the Commission as intervenor) to "test-case" allegedly violative national practices. The record of the Commission should provide some confidence in this context. One could even consider more radical ideas such as the Commission itself directly or through agents instigating or at least financing such actions in the national courts.

4. A reduction in the volume of directives is apparently already Community policy which, in the perspective of compliance at least, should be welcomed. Not only will it reduce the legislative burden of the Member States but it will also contribute to a higher standard of directives which might facilitate implementation. There has also been a judicial dimension to this reduction. Very tentatively I would suggest that the Court of Justice has tried to influence the numbers game. One effect of the ruling in the Cassis de Dijon case^{39/}

has been, at least so far as the Commission is concerned^{40/} to reduce the need for many harmonization directives. It would appear thus that by one judicial stroke a major source of non-implementation has potentially been struck out. At the same time it is probable that as a result of this ruling the instances of non-application in this field will increase and since the logic of Cassis invites possible misapplication, the constant judicial scrutiny for potential for judicial defiance or evasion will increase as well. The recent Buttership case is a warning from a closely related field.

5. The emergence^{of} cases in which the Court is defied introduces a new element into the prosecutory policy of the Commission qua public attorney general. Whereas an aggressive prosecutory policy may be welcome in a period of slowly escalating non-compliance, the danger of diluting the credibility of the Court cannot be ignored. Serious issues of ————, policy are at stake. On the one hand one cannot but doubt the utility of a growing list of judgments hanging against, say, Italy which are then defied or not executed. On the other hand, failure to prosecute in the face of non-compliance and despite a reasoned opinion might induce, even invite, further non-compliance. Moreover, failure to prosecute might reduce the potential deferment effect of the pre-trial procedure, penalise other Member States faithfully complying with Community law and introduce a measure of discrimination to a process the impartiality of which is essential. How should the Commission deal with the

prospect of a Member State not complying with a judgment? Despite the apparently imperative nature of Article 155, the Commission has discretion whether or not to bring an action under 169 after the reasoned opinion^{41/} a discretion recognised by the Court^{42/}

[Commission v France 7/71 [1971] ECR 1003]. A.G. Roemer has specifically mentioned politically sensitive situations as ^{reasons} justifying discretion. Although the Advocate General did not probably have in mind the possibility of a state defying the Court, I would submit that this undoubtedly constitutes a politically sensitive situation and would thus not be, legally, an illegitimate consideration at least by reference to the guidelines of the Advocate General. For its part the Court has frequently indicated that once a case is brought legislative-political difficulties (benign reasons) can be no legal defence for failure to implement.^{43/}

Surely the Court could not say anything else if it was not to legitimate wholesale non-compliance and indeed undermine the entire normative structure. It is precisely this inability of the Court to say anything else, which places the political responsibility on the Commission as prosecuting authority. The distinction between defiant or benign non-compliance in itself does not solve the problem. On the one hand one might argue that one should not prosecute cases other than deliberate (defiant) non-compliance. But it is precisely in this type of case (e.g., Mutton and Lamb) that a Member State is likely

to defy the Court as well. Equally, a policy to avoid prosecuting benign non-compliance (especially non-implementation) might invite further cases. Should the Commission perhaps prosecute cases where it is relatively sure that the Court will be obeyed? This would be difficult for two reasons: It is not easy to predict in advance the Member State reaction to conviction. Also, as we saw in the empirical analysis, often it is the initiation of an action which terminates an infringement. Further, this policy would have the effect of rewarding defiance and lawlessness. In the absence of new enforcement measures it would seem that no such overall policy is viable. I would tentatively suggest that a policy of automatic prosecution after a failure to comply with the reasoned opinion is mistaken. Perhaps greater caution should be exercised in the dispatch of reasoned opinion. Although the language of Article 169 is mandatory ("... it shall deliver a reasoned opinion) the Mandate becomes imperative only "if the Commission considers that a Member State has failed to fulfil an obligation" which introduces, perhaps through the back door an element of discretion.

At the same time the Commission should not refrain from bringing an action even if it confidently expects subsequent defiance or benign non-compliance. However it should be ready to use every power available to it both private and public to ensure that the decisions of the Court are complied with. This might invoke action

at Ministerial level but could also be an area for close

cooperation with the European Parliament. Above all the Commission should not establish a new asymmetry in this field.

→ We noticed the earlier tendency of the Commission to concentrate on legislation but not on ensuring compliance. There should not now develop a situation whereby the Commission indulges in prosecuting (as a correction to its earlier policy of neglecting compliance) without considering execution. The supranational structure demands efficient and responsive decision making, consistent compliance, effective judicial enforcement and faithful execution. A policy which focuses on any of these elements to the exclusion -- partial or complete -- of the others might undermine the coherence of the entire system.

Footnotes

1. See generally, H.A.H. Audretsch, Supervision in European Community Law (North Holland, Amsterdam, 1978); Evans, The Enforcement Procedure of Article 169 EEC: Commission Discretion 4 E.L.Rev. 442 (1979). H.G. Sohermers, Judicial Protection in the European Communities (Kluwer, Deventer, 1979) § 386-442; 1982 Report of Legal Affairs Committee of the European Parliament PE 77,275 (Sieglerschmidt Report). I am also indebted to the contributors and participants to a conference on non-compliance in the European Community organized by Professor Rasmussen and the Danish Society for European Studies in November 1981, Copenhagen.
2. E.G., the French decision (or connivance) to obstruct the entry of Italian wine in 1981.
3. E.g., The Cohn-Bendit case [1979] Recueil Dalloz-Sirey 161.
4. The Mutton & Lamb Case, Case 232/78 Commission v France [1979] ECR 2729.

5. This was done indirectly by the Italian constitutional Court in its 1981 Decision in Canaviccola which failed to follow the European Court's earlier decision in Simenthal.

6. See, e.g., Case 128/78 Commission v. U.K. [1979] E.C.R. 419: Britain has only partially complied with the decision.

In Case 171/78 Commission v. Denmark 1980 E.C.R. 447, Denmark has technically complied that the new Danish law while respecting the letter of the judgment completely avoids its spirit. See, Rasmussen, Denmark in Face of her Community Obligations, paper to colloque, note 1 supra.

7. See, e.g., Secretary of State for the Home Department, ex parte Santillo [1981] 2 AllER 917 in which the British Court of Appeal on receipt of a reference by the European Court (Case 131/79 [1980] E.C.R. 1585) managed whilst paying lip service to the preliminary ruling rendered a judgment inconsonant with the ruling.

8. The Commission is reluctant to reveal full statistics of non-compliance. I have relied on the following

sources. The Bulletin which since 1978 publishes lists of reasoned opinions; The Annual Report of activities which gives overall figures for infringements; Figures given to the European Parliament and published in the Sieglerschmidt Report (note 1 supra) and Commission Reply to Questions 2191/80.

9. The Court has been consistent in its enumeration of the conditions for determining the direct effect of a measure: in general it must impose a precise obligation which does not necessitate an implementing measure and which leaves no discretionary power to the Member States. (As regards the direct effect of directives one must ascertain, in addition, "... whether the nature, general scheme and wording of the provision in question are capable of having direct effects". Case 41/74 Van Duyn /1974/ E.C.R. 1337 at 1356 (per Payras A.G.)).

There is a conflict in the Court as to whether these two tests are cumulative or mutually exclusive. Cf. Case 131/79 R. v. Home Secretary ex parte Santillo note 7 supra; _____ > Case 148/78, Ratti /1979/ E.C.R. 1629. _____ >

_____ >
See discussion in Usher, Direct effect of directives: dotting the i's ..., 5 E.L.Rev. 470 (1980) at 472-473; and see also, Timmermans, Directives: Their Effect within the National Legal Systems, 16 C.M.L.Rev. 533 (1979).

10. See Case 148/78 id. Usher, id. Timmermans id.
11. E.g., Article 121 EEC.
12. E.g., Article 87 EEC.
13. E.g., Article 43 (2) EEC.
14. Article 100 EEC.
15. Article 155 EEC (emphasis supplied).
16. And see also, Schermers, note 1 supra at §§ 439-441 (pp.252-254).
17. B. Pryce, The Politics of the European Community (Butterworths, London, 1979) p.59.
18. Question 453/79 -- Debates of the European Parliament 10.3.80 at 24 (English version).
19. On this problem in general see Cappelletti, The

Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference -- or no Difference at All?, in H. Bernstein, U. Drobnig, H. Kötz (eds.) Festschrift für Konrad Zweigert (J.C.B. Mohr, Tübingen, 1981) 381, esp. at 383-387 and references therein. Cf. Rasmussen, Why is Article 173 Interpreted Against Private Plaintiffs 5 E.L.Rev. 112 (1980).

20. See e.g., Case 51/76 Federation of Dutch Undertakings v. Inspector of Customs and Excise [1977] 1 E.C.R. 113 and see Duffy, EEC Directives, Judicial Control of National Implementation, 41 M.L.R. 219 (1978).
21. Since not all legal systems provide for a "preemptive" declaratory challenge of legislation. Even if the disputed provision is not penal, entering into any legal obligations on a basis of a law subsequently to be declared invalid may be economically harmful.
22. In Ireland, for example, Finbarr Murphy observes that "In a number of its Reports the Oireachtas Joint Committee has pointed to the existence of possible hindrances to access to remedies in connection with Community law. It has observed that Irish implementing measures frequently do not cite the Community basis for the measures in question".
Finbarr Murphy, Remedies for Breach of Community Law,

Irish Report to Ninth FIDE Congress. (Fide --
Sweet and Maxwell, London 1980) 5.12-5.13.

23. Sieglerschmidt Report, note 1 supra.

24. Id. at § 18.

25. On which all data relevant to the implementation
of directives.

26. Case 158/80 REWE v. Hauptzollamt kiel (not yet
reported);

27. Note 3 supra.

28. Decision of 16.7.81, [1981] Europarecht, 442.

29. Note 5 supra.

30. E.g. Article 36 EEC.
31. Cappelletti has cogently argued that the presence of the parties before a judicial tribunal and observance of the fundamental guarantees in combination with the rules of national justice can bestow a different, no less valid, legitimacy on the outcome. In order for this rationale to apply fully to the European Court, procedures will have to be evolved which ensure —————> the adequate representation of the Member States' point of view. Cf. Cappelletti, The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis L.I.E.I. 1 (1979).
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32. I am indebted to Ms. N. Vavasseur whose work on the French administration has been very enlightening.
33. See generally,
in A. Cassese (ed.), Parliamentary Control of Foreign Policy (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980).

34. Id.

35. Copenhagen Colloque, note 1 supra.

36. Sieglerschmidt Report, note 1 supra.

37. Id.

38. See Case 8/81 Becker (not yet reported).

See also Case 148/78 Ratti /1979/ E.C.R. 1629
per Advocate-General.

39. Case 120/78 /1979/ E.C.R. 649.

40. Commission Document OJ C 256/2 1980.

Ccf. opinion of CCC, ENV/159/81 (Rev).

41. See generally Evans, note 1 supra and Schermer, note 1 supra at § 425-428.
42. Cf. Case 7/71 Commission v. France [1971] E.C.R. 1003; Case 2/73 Geddo [1973] E.C.R. 865 (per Trabucchi).
43. See e.g., Case 144/77 Commission v. Italy [1978] E.C.R. 1307.

Chapter 11

The Uniform Protection of Community Law--Unequal Remedies:
the Procedural Challenge and the Access to Justice Challenge

A. The Procedural Challenge

The issue of uniform protection, like that of non compliance discussed in the preceeding chapter, also results from the maturing of the system.

Even in those situations where individuals are able to invoke Community law directly before the national courts (and thus serve as indirect guardians of incorporation and application of Community law by Member States), the special character of supranationalism produces a problem which touches on the fundamental issue of uniformity and diversity with which all "federal" systems have to grapple. I shall ^{not} be concerned here with the situation in which a choice has to be made between enacting a Community measure allowing the Member States more or less diversity. But with the situation where this choice has been made and a Community law already introduced either directly, by a measure having direct effect, or through state implementation. My focus will be on the use of such laws by individuals in seeking to protect the rights bestowed upon them.

In this situation where the legislative choice has been for "one law" the uniform application of Community measures throughout Member States has been among the most consistent principles upon which the Court of Justice has insisted in its jurisprudence. It has been used amongst other reasons as a justification for evolving the doctrines of direct effect and supremacy ^{1/} and was one of the strongest arguments used by the Court in resisting the national constitutional challenge in the context of the human rights debate. Should this principle be unjustifiably compromised one of the very foundations of normative supranationalism would be threatened. Thus in a recent restatement of its human rights position, the Court affirmed that

/t/he introduction of special criteria for assessment /of the compatibility of Community law with fundamental human rights/ stemming from the legislation . . . of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community. 2/

And in another case the Court elaborated this general constitutional principle by stating that

/t/he binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril. 3/

The explicit underlying value of this unity principle is clearly integrationalist. Its counterpart in the Treaty is the very Article 177 which provides the mechanism for ensuring that Community measures will be uniformly interpreted and, as we saw in Part One —→ applied throughout the Community. ^{4/} Beneath the explicit integrationalist value lies an even deeper one. Non-uniform protection in similar situations, without a meaningful distinguishing criterion, would violate the per se principle of equality before the same law. Thus from the strict, almost idealist, integrationalist point of view the existence of unequal remedies -- remembering that rights and duties are only meaningful and measurable in terms of the remedies available for their vindication ^{5/}-- for the protection of the same substantive Community based rights, would be inconsistent with fundamental principles of equality acknowledged in democratic legal systems. ^{6/} In this sense the constitutional principle and procedural principles become interchangeable. To the extent that this inequality would coincide with national boundaries, thereby redividing nationally the integrated legal system, it would represent a serious gap in the normative edifice of supranationalism.

And yet the very enmeshment of the legal Community and national orders, whereby Community derived rights and duties are often vindicated -- by the logic of the system -- through the national courts by means of national procedural law, has come to produce this very result -- a disturbing inequality of remedies. Given that the Community system is not a unitary one, it is unavoidable that differences of protection will, in some cases, justifiably exist among the constituent parts -- a fact accepted even in well developed federal systems like the USA. ^{7/} This problem, the solution to which must necessarily be one of the main future challenges in the evolution of normative supranationalism, may be best illustrated by reference to a number of concrete judicial decisions.

a. Unequal remedies -- a conflict of principles

As a background to understanding the emergence of the problem of unequal remedies and non-uniform application one must recall two aspects in the process of judicial review. We noted in the retrospective analysis that a reference under Article 177 for an interpretation of Community law often serves as a means for judicial review of national laws or administrative practices for their compatibility with Community law. Frequently, the review takes place when a litigant challenges a national charge, levy or tax (often on imports) which, he claims, violates a superior Community norm.

The matter is rendered particularly complex since the European Court in the first place, has insisted on the declaratory rather than constitutive nature of its interpretative judgments. "The interpretation which, in the exercise of the jurisdiction conferred on it by Article 177 . . . the Court of Justice gives to a rule of Community law clarifies and defines . . . the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. ^{8/}

In the context of challenging a national charge or levy, the ex tunc effect of the judgment would mean that in situations where the national measures were in fact to be declared incompatible with Community law the full vindication of Community rights would entitle the individual not only to a moratorium on future charges of the same kind but also to a repayment of all sums previously illegally exacted from him.

In the second place, despite certain doctrinal considerations which insist on the strict individual binding force of European Court judgments of this type ^{9/} the better and more widely accepted view is that these judgments have at least de facto, erga omnes effect.

The Paris Court of Appeal went so far as to state that

The decisions of the Court of Justice of the European Communities rendered for interpretation are of a general nature because they are designed to unify the case law of the courts of the Member States; they are therefore binding on those courts.^{10/}

This means that not only would the individual claimant be entitled to retroactive redress but all others, even in other Member States, from whom similar unlawful charges were exacted would be equally so entitled. The economic stakes can be very large: in one case after a decision of the Court of this kind ^{11/} the Dutch authorities were obliged to repay an excess of seven million Florins in respect of a charge illegally levied. ^{12/}

Yet in many cases characterization of the Court's decisions as declaratory (with ex tunc effect) is quite artificial especially in situations in which a widespread diverse understanding by individuals and Member States prevailed prior to the decision. The Court, in one famous instance, ^{13/} recognized the "serious effects" its judgment might have had if given erga omnes ex tunc validity and accepted the possibility of a "constitutive" decision.

In that exceptional case the Court gave a prospective ruling, its applicability to past relationships extending only to those claims already lodged at the time of judgment. But in its subsequent jurisprudence the Court

emphasized the exceptional nature of that judgment, and the fact that only the Court itself could exclude general ex tunc or erga omnes effect. ^{14/} Perhaps the fact that in that case horizontal legal relationships established in good faith among individuals on the basis of the previous understanding of the law swayed the Court. ^{15/} Recently the Court has experimented further with prospectivity but the device remains essentially exceptional. ^{16/} In principle, then, in all cases involving monies illegally exacted, the individual claimant and all those in his class would be entitled, pursuant to the direct effect of Community law, to reimbursement going back to the commencement date of the Community measure.

In practice, since the vindication of these rights takes place necessarily through the national courts and national legal systems, successful claimants will have to satisfy the procedural requirements of their national legal system, say, as regards time limits. It is the procedural variations among the different systems which gives rise to the problem under discussion. The issues became concrete in two cases in the mid-70's. ^{17/} It has been brought into sharper focus and magnified in a spate of recent cases ^{18/} and is likely to arise in a variety of manifestations until the source of the problem is tackled in the future. The complex issues are best

discussed by reference to some of these cases.

b. The case of Rewe and its progeny

The facts in this case are as simple as the law and issues raised therein are complex. The plaintiff, a German importer of apples was claiming the reimbursement of a charge imposed on him in 1968 by the German authorities for a phyto-sanitary examination of his imported fruit. In fact the charge had been unlawfully exacted, a fact which came to light in a decision of the Court decided some years after 1968 which found the charge to be contrary to the directly effective Article 13 EEC and a Council regulation. ^{19/} It should be pointed out that there are many hundreds of diverse non-tariff barriers to trade in the Community and to most intents and purposes only the European Court can authoritatively decide which of these are prohibited in accordance with the rules of the customs union. The facts of these cases may seem trivial but it should be remembered that, apart from the procedural-constitutional principles which concern us, the economic stakes are very large; further, the smooth operation of the customs union is a mainstay policy which the Common Market ought to achieve. The fact of illegality was undisputed in the present case by the defendants, the German administrative authorities.

But an application for refund by Rewe was met by the defence that they were time barred by the German limitation period which had expired long before the illegality came to light.

The question which the European Court had to answer was

. . . whether where an administrative body in a state has infringed the prohibition on charges having an effect equivalent to customs duties . . . the Community citizen concerned has a right under Community law to the annulment or revocation of the administrative measure and/or to a refund of the amount paid even if under the rules of procedure of the national law /through which, by necessity, the citizen must vindicate his rights/ the time limit for contesting the validity of the administrative measure is past. 20/

In its laconic judgment 21/ the Court first affirmed the direct effect of the Community measures in question -- and it is worth noting that Article 13 of the Treaty comes within Part One of the Treaty dealing with Principles, a fact which the Court had often adverted to in its jurisprudence -- and the duty, in accordance with the Community system, of national courts to protect the rights those measures confers on citizens. It also noted that as far as the remedies for violation of the principles were concerned the Community did not have its own procedural rules to grant a remedy. Hence

it was for ". . . the domestic level system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions ...". 22/

The Court did insist -- delphically -- that these must be "reasonable", and that the national procedural requirements 23/ should not make it completely impossible in practice to exercise the rights which the national courts are bound to protect. It also said that within the national system the procedural requirements in respect of Community measures should not be less favourable by comparison to requirements concerning purely national claims. On the facts, the German limitation period of one month was not considered unreasonable. To be sure the Court accepted the fundamental reciprocity between remedies and rights in that total exclusion of the former was seen to extinguish the latter. And yet, as stated by the Commission in its submissions, the time limits laid down by national law vary between one month, as is the case in Germany, and 30 years. 24/

The effect of the Court's decision, leaving the vindication of Community rights almost exclusively to the procedural requirements of national law, was to create the unsatisfactory situation whereby the measure

of protection afforded the individual in respect of the wrongful application of Community law by national authorities would vary considerably depending on the national forum where the case would be tried and its rules of procedure.

The difference are not mere discrepancy between constitutional-substantive Community rights and national procedural rules. For to the extent that in the Community system in many situations national law and national courts become willy-nilly Community law and Community courts, and further, to the extent that civil procedure defines and limits the remedy (and therefore the right), these differences imply a contradiction in the constitutional right itself. We have here one of the inevitable consequences of the non-unitary system in which principles of uniformity and diversity interact.

In principle and as a permanent solution the European Court could not have excluded completely the legitimacy of imposing a time limit for bringing an action to redress wrongs caused by national administrative measures violative of Community law. Time limits serve the essential legal principle of certainty, and balance the interests of the individual with that of society. ^{25/} The Court was also probably correct in judging that the ultimate rectification of this diversity -- leading both to the non-uniform protection of Community rights throughout the Common Market and to unequal treatment

of individuals before the same substantive law -- could be achieved by harmonization of procedural law, a matter coming within the legitimate domain of explicit legislative action the precise technical domain of explicit legislative action the precise technical details of which are best left to the Member States. Thus the Court states that "Where necessary, the harmonization provisions of Articles 100 to 102 and Article 235 enable appropriate measures to be taken to remedy differences between the [procedural provisions] in Member States if they are likely to distort or harm the functioning of the Common Market". ^{26/} It may, nevertheless, be useful to examine whether the Court, so impactful in the "Constitutional Phase" of normative supranationalism is obliged to leave this important next evolutionary step entirely in the hands of the political organs. The arguments are too finely balanced to give a decisive reply. On the side of "uniformity" one could make the following observations:

There is a certain tension -- at least in tone and emphasis -- between Rewe and, say, the decision of the Court in Simmenthal. In the latter case, the integrity of the legal order of the Community was regarded as sufficient to prohibit the internal Italian procedural requirement which obliged lower Italian courts to refer any questions of supremacy

to the national court designated for this purpose -- the Italian Constitutional Court. In Rewe, and its progeny, by contrast the Court stated that "... in the absence of Community rules ... [it is permissible] for the domestic legal system of each Member State to designate those Courts having jurisdiction and to determine the procedural conditions ...". ^{27/}

At first sight Simmenthal is distinguishable since in that case there was no absence of Community rules : Article 177 itself fills the gap. But it was only the creative interpretation by which could not therefore be excluded in the present instance especially if we are to remember that the very purpose of Article 177 is to ensure the uniform interpretation and, necessarily, application and enforcement of Community law.

A more fundamental distinction is tied to the fact that by contrast to Simmenthal where the Court could strike down an incompatible procedural requirement of the Italian legal system, in Rewe and its progeny it would appear that the Court could not merely strike out but would have to provide a replacement since, as stated above, time limits are an essential feature of any legal system. It would be unrealistic to expect positive judicial legislation on such intricate and technical issues; although in relation to the Community's own rules of procedure the Court has not

been completely impotent. ^{28/} As a permanent solution, undoubtedly specific Community legislation or harmonization measures are called for. But this in itself does not exclude the possibility of judicial action by way of striking out the national time limits as an interim measure until such time as a unifying instrument is introduced. Qualitatively the Court would be doing no more than it did in any of its previous landmark decisions such as Costa v. ENEL. Making Community rights procedurally unconditional would be stiff medicine indeed, but this would provide a strong incentive for Community legislative action. On the judicial level this proposed action is less alarming than might seem at first sight. Two legal principles are locked in conflict: the integrity of the Community legal order which calls for the uniform protection of Community rights and equality before the law, as against the principle of legal certainty which is at the foundation of the national time limit. The thrust of the uniformity argument would be that there is no compelling reason for the Court to compromise almost completely the first principle at the expense of the second one.

It could be argued that by provisionally striking down national time limits another type of inequality

would be created within the national legal system whereby different time limits would be applied depending on the source of the right at the basis of the claim--national or Community. This inequality is more illusory than real, however, since differentiation of time limits depending on substantive source of law (e.g. contractual or delictual) is quite normally accepted in most national legal systems. Furthermore, substantive Community law in any event does not always fall easily into the procedural categories of national law for the purpose of determining the national procedural rules which should apply to it. ^{29/}

This conclusion leads to a further point? The eventual legislative correction which will be required need not involve a wholesale harmonization of national procedural law but rather specific Community regulatory action to establish relevant time limits in respect of Community acquired rights. This would be legally justifiable and politically far less explosive. One can only speculate whether the efforts already made in this direction ^{30/} would not have received a considerable boost had the Court of Justice taken a bolder stand on the normative principles.

Coming now to the "diversity" argument one should not forget that the existence of different municipal legal systems which include a diversity of procedural rules is not a mere technical obstruction to uniform protection of Community rights to be removed -- with or without the Court's prompting -- by a simple technical exercise. Rather, arguably, the strict connection between procedure and substance may indicate that the national procedural diversity is a reflection of deeper differences depending on societal values such as the relationships between the citizen and the administration, the privileges of the executive and the general balance between public and private interests.

If the latter hypothesis is correct -- and comparison with non-unitary systems may point in this direction ^{31/}-- then the Court's decision becomes more understandable. Integration in this case would clearly become a matter for a slower, orderly and voluntary process of harmonization -- as provided e.g. in Articles 100-102 EEC. And, as far as equality is concerned, this alternative hypothesis would suggest that given that the "belongingness" of individuals to different legal systems is not a mere technicality, and that, as a result, similar factual claims based on identical Community rights are in effect objectively "unlike situations", this reasoning would justify unlike treatment. It is also

possible that this line of decisions is one of the indications of a phase of judicial self-restraint, of a levelling off of the approfondissement process, of a recognition by the Court of the fourth order of analysis outlined above. The overall stability of the legal-political system must also be accepted as a valid factor in evaluating this recent jurisprudence.

Pending final resolution of this issue it may be possible for the Court to take a midway position. I would suggest that the Court could perhaps consider a policy of judicial abstention as regards the actual national time limits but impose a Community judge-made rule as to the moment time must start running. ^{32/} A possible commencement point could be the moment when the plaintiff should reasonably have become aware of his rights, such as the date on which the Court itself clarified the issue. This would not affect the ex tunc nature of the judgment, although it would favour the individual's ignorance of his rights as against the Member States' ignorance of their wrong. This may be a useful via-media between the need for equal and uniform protection on the one hand and the acknowledgment of Member State legitimate procedural diversity on the other.

The issues raised in Denkavit, Just and Ferwerda were broadly similar. The basis for non-uniformity in those cases was not the diversity of time limits but the basis for calculating the loss suffered as a result of the illegally exacted charges and levies. Apparently in some systems the question of whether the trader has passed on the cost of the illegal charge to the customer is relevant in calculating monies to be repaid. In other systems this matters not. Once again the Court employed the formula that "... in the absence of Community rules concerning the refunding of national charges which have been unlawfully levied, it is for the domestic legal system of each Member State ..." ^{33/} to prescribe the remedies. The Court specifically allowed considerations of unjust enrichment to be taken into account so that it would not be contrary to Community law to consider whether or not the unlawful levy was passed on to the customer and full repayment would constitute an unjustified windfall to the importer. ^{34/} Once again, individuals, in apparently equal factual situations would be treated differently according to the jurisdiction in which they sought or were obliged to seek Community derived protection. In Ferwerda the reverse situation arose. The question was under what conditions could the national - Community

authorities claim from individuals the repayment of a subsidy erroneously granted. The Court accepted that (Dutch) national rules of legal certainty should govern the question, leading of course to the same type of diverse treatment.

A peculiar twist to this problem occurred in the Express Dairy case. There the illegal charge was collected by the Member State acting as an agent for the Community in respect of a Community measure held to be illegal. This then was a situation in which a Community measure created a wrong applied accross the board throughout the Member States. ^{35/} And yet vindication of rights, dependent on the national legal systems with their procedural diversity was acknowledged as leading to "... difference in treatment on a Community scale". ^{36/} As a result, individuals may receive different redress, in terms of time limits, quantum of repayment, interest charges and so forth.

In this context the procedural challenge is particularly stark, since in this situation uniform enforcement of the Community rule would be likely but no uniform redress should the rule be found to have been illegal.

c. Unequal protection -- other instances

Rewe and its progeny illustrate most clearly the emerging constitutional-procedural gap and one of the prospective challenges to the evolution of normative supranationalism. Two other illustrations will serve to demonstrate that this line of cases is not unique and that the procedural challenge is likely to creep up in a variety of other situations.

It will be recalled that one way of sidestepping the restrictive approach of the European Court regarding direct individual challenges to general Community legislation under Article 173 was by way of reference on the validity of Community law under Article 177. The substitution is not complete since the effects of annulment (under 173) are different from those of declaration of invalidity under 177, ^{37/} but it undoubtedly ameliorates the almost completely blocked avenue under 173. Yet, again, the ability of the individual to use the 177 challenge to validity will depend on the range and form of national modes of action. Thus for example in the Royal Scholten Hoenig case, ^{38/} and English plaintiff was able to challenge the application of a Community measure (through the intermediary of the British administrative authorities) by way of an application for a "declaration" in the

English High Court -- a specific form of action suited to judicial review of administrative action. The High Court duly referred the matter to the European Court of Justice which in turn gave its decision on (partial) invalidity which was applied by the High Court. The plaintiff had his redress. This is particularly efficient remedy since the law can be clarified in advance of any action the legality of which is unclear. This satisfactory result depends of course on the availability of the declaration and its scope. Thus, if the Community measure, say a directive, were not merely a matter for national administrative action but were implemented by an Act of Parliament, it is doubtful whether in England a declaration would lie. ^{39/} By contrast it would seem that in Denmark and Ireland, if the individual could establish sufficient interest it probably would. Once again we have the prospect of unequal remedies in relation to a Community norm which presents itself identically throughout the legal order.

Finally, it is easy to imagine that as regards the non-contractual liability of the Community the policy of the Court of Justice to encourage the processing of claims through national courts ^{40/} will similarly lead to a diversity of remedies -- including perhaps the quantum of damages -- depending on the specific national delictual rules.

There are no easy solutions to these problems. They involve profound policy issues about the measure of diversity which the Community system can tolerate and no less difficult pragmatic questions about the feasibility of Community regulation and harmonization in so technical a legal field. Nevertheless, the centrality of the principle of uniform interpretation and application of Community law to the entire normative structure of supranationalism is such that the present difficulties cannot but be a major challenge to be resolved in the future. The per se value of non-discrimination only adds moral acuteness to the integrational problem.

3. Application and Enforcement of Community Law -- The Access to Justice Challenge ^{41/}

This final challenge to normative supranationalism is only beginning to reach the consciousness of the European policy maker.^{42/} Access to justice is concerned with the need to transform formal rights into effective rights. In its basic manifestation it is concerned with the essential constitutional requirements in civil (and criminal) procedure to ensure a process which corresponds to societal notions of justice. At a second level it is concerned with facilitating the access of individuals and groups to dispute resolution

fora and questioning the adequacy of the existing fora with a view to developing new processes and bodies more suited to the exigencies of the contemporary problems faced by individuals in a mass society. Questions such as legal, the mechanisms, procedural and institutional, to vindicate diffuse and fragmented rights such as consumer and environmental rights, the role of individual litigants, public authorities, prosecutors and special conciliation and arbitration bodies are among the questions with which the search for effective access to justice has to grapple.

At first sight there seems little connection between this range of problems and the evolution of normative supranationalism. It is possible to take the view that since, in most instances, the application of Community law and the vindication of Community based rights are achieved through the municipal legal system and national courts, the issues of access to justice do not rise at the supranational level. ^{43/} A closer look reveals, however, several points of contact.

a) Accessible justice even in its extra-legal manifestation can be viewed as extension of procedural law; the availability of effective legal services is no less crucial to the party seeking to vindicate his rights than is the need to satisfy procedural requirements such as locus standi and time limits.

Substantial differences in the range of legal services affecting, inevitably, the protection of Community based rights will lead to the same type of fragmentation and inequality along national lines discussed in relation to the "procedural challenge". Harmonization in this field, however, is far more difficult, for whereas it was possible to argue that procedural requirements such as time limits need not be, within the municipal system, identical for national and Community rights, the same cannot as a general principle be argued as regards the provision of legal services. It would be difficult and undesirable to argue for certain legal or extra-legal services to Community migrant workers which would be denied to non-Community migrants. ^{44/} The harmonization effort would have to be therefore in most cases universal.

b) In those fields where the Community exercises a very frequent direct jurisdiction over individuals such as competition and agriculture and where there is a correspondingly frequent direct recourse by individuals to the European Court for legal protection, there is scope for investigating the procedural rules before the Court with the concerns of access to justice in mind. Issues such as locus standi for consumer groups and the role of the Commission as a supranational public attorney have already emerged in the competition field. Thus, for example, one of the objectives of the

Community competition policy is to improve the quality and the prices of goods for the benefit of consumers. The prohibition on monopolistic agreements and practices when translated into a duty imposed on undertakings to refrain from certain activities, bestows a diffuse and indirect right on consumers to be protected from abuse. This immediately poses one of the main access problems; that of safeguarding rights not directly granted, and formed in terms of a duty on potential violators. Under Council Regulation 17 ^{45/} the Commission has the direct task of enforcing the competition policy -- acting thus as a supranational public agency. In addition Regulation 17 provides that individuals, even if not parties to an alleged violative agreement, may lodge a complaint against it with the Commission provided they have a "legitimate interest". This term is yet to be clearly defined by the European Court. Should consumer groups -- national or transnational -- be bestowed with automatic legitimate interest which the Member States already enjoy? The advantages would be obvious since they would have then all the legal and political resources of the Commission with them. In one of its competition cases ^{46/} the Court allowed the intervention in the proceedings by the Italian

Unione Nazionale Consumatori in accordance with Article 37 of the protocol of the Court's statute. It said:

Since it is the particular objective of the Union to represent and protect consumers, it can show an interest in the correct application of Community provisions in the field of competition, which not only ensure that the common market operates normally but which also tend to favour consumers.

Accordingly the Union has an interest in the solution of the Cases at issue, to the extent that the latter concern the finding that the applicants in the main actions indulged in a concerted practice with the object and effect of protecting the Italian market. 47/

We can see here evidence of the type of argumentation surrounding the issue of class action, private-public prosecutors and so forth. 48/ With the expansion of Community jurisdiction to environmental and consumer protection the classical fields in which the emergence of potentially interested parties constituted on transnational rather than national lines, this problem is likely to be magnified in the future. Issues such as Community class actions widening the rules of standing to allow individuals -- or groups of individuals -- to challenge more easily directives will all have to be tackled as part of this new consciousness.

c) The emergence of access to justice as a major prospective preoccupation goes to the very social and human credibility of the Community and its organs, a Community often accused of being concerned solely with

businessmen and trade. As has been argued elsewhere:

. . . By its very nature, the Community, to give but one example, has encouraged the transnational mobility of labour and goods. In so doing, it has incurred responsibility for resolving the special problems created by these phenomena. If we consider the plight of the migrant worker in contemporary Europe, and the problems he may have in finding housing, claiming social security and confronting immigration laws, problems which are exacerbated by the difficulties of language, social adjustment and family and educational disruption, we can appreciate that integration at the level of governments raises a corresponding set of new problems at the lowest levels in society. Likewise, the free movement of goods creates its own range of problems for the consumer. It will be argued, correctly, that solutions to these transnational problems can best be found, and in some cases have been found, by the Community at the transnational level. Indeed, the response of the Community -- and the Court -- has been to create transnational rights protecting migrant workers and the like. However, if these rights are to become more than "paper rights", institutions and machinery must be created to make them truly accessible to those whom they were designed to protect. 49/

The problem also takes on a quantitative dimension since:

As the Community branches out into new embryonic fields such as Consumer Protection, Environment and Workers' Participation, one can envisage that quantitatively the number of cases coming before national and transnational "European Courts", and possibly choking the system, will be drastically increased. Moreover, movement into new substantive areas will no doubt give rise to a new set of substantive rights and these would, in turn, inevitably increase pressure for procedural developments within institutional frameworks. The problem is not one of simply creating new safeguards . . . important as these may be. Rather, the problem is essentially how to make existing rights effective within these new situations. One of the most pressing tasks, then, will be in assisting the evolution of new types of legal services, prototypes of which exist in several Member States and towards which the Community has already taken certain steps. 50/

d) Finally, there is an access to justice dimension which is unique to the supranational system. The traditional concerns of access to justice are with giving increased protection to the individual and his rights and with the improvement of dispute resolution processes in society. It will however be recorded that a central feature of the supranational system was the function of the individual as a guarantor of inter-state obligations. The so-called "all or nothing effect" depended, in part, on the ability of the individual to bring actions before the national courts the judgments of which -- when applying Community law -- would be binding on the respective governments. In this sense improved access by way of raising the level of Community law consciousness, and generally removing obstacles to Community based actions will have the integrational consequence of strengthening an important dimension on which supranationalism partly depends. Increased access will not only work for individuals but for the Community system itself.

Footnotes

1. In Costa, Van Gend en Loos and their progeny the Court always relied on the uniformity requirement introduced inter alia by Article 177 as a major ground in the decisions. See citations in Chapter Two supra.
2. Case 44/79 Liselotte Hauer v Land Rheinland-Pfalz /1979/ ECR 3727, Recital 14 of Judgment.
3. Case 14/68, Wilhelm v Bundeskartellamt /1969/ E.C.R. 1 Recital 6 of Judgment.
4. Viz. "the purpose of that /177/ jurisdiction is to ensure the uniform interpretation and application of Community law, and in particular the provisions which have direct effect, through the national courts." Joined Cases 66, 127 and 128/79 Amministrazione della Finanze v Meridionale Industria Salumi, /1980/ ECR 1237

5. "At an early stage in his legal education the student encounters the Latin maxim Ubi jus ibi remedium ... /to/ which the realist replies : Ubi remedium ibi jus." F.H. Lawson, Remedies in English Law (Penguin, 1972) 14. Cappelletti, Judicial Review in the Contemporary World (Bobbs-Merrill, Indianapolis, 1974), is equally emphatic: "All of this hearkens back to the old truth that a right without an adequate remedy is no right at all".^{At} 78-79.
6. The Court on numerous occasions has indicated that "the general principle of equality ... is one of the fundamental principles of Community law. The principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified." Joined Cases 103, 145/77 Royal Scholten-Hönig v Intervention Board for Agricultural Produce /1978/ ECR 2037, Recitals 26-27 of Judgment. See also Joined Cases 117/76 and 16/77 Ruckdeschel v Hauptzollamt Hamburg - St Annen /1977/ ECR 1753 at 1759. And see generally Schermers, Judicial Protection in the European Communities (Kluwer, Dordrecht, 1979) §§ 89-94 (at 52-54).

7. See generally, C.A. Wright, Handbook of the Law of Federal Courts (West Publishing) (1976) at e.g., 195-196.
8. Salumi, supra n 4, Recital 9 of Judgment (emphasis added). On the general question of the retroactive and prospective nature of judicial review, see M. Cappelletti and W. Cohen, Comparative Constitutional Law (Bobbs-Merrill 1979) 98-112, and Aldisert, The Judicial Process (West Publishing 1976) 877-935.
9. See Lagrange A G submissions in Joined Cases 28, 29 and 30/62 Da Costa v Nederlandse Belasting-administratie [1963] ECR 31, 41. See also the oblique reference by the Court itself, Case 29/68 Milchkontor v Hauptzollamt Saarbrücken [1969] ECR 165, Recital 3 of Judgment. For a general discussion on the issue of Inter partes v Erga omnes decisions, see Cappelletti & Cohen, supra n 8, 96-98; Trabucchi, L'effet "erga omnes" des Décisions Préjudicielles Rendues par la Cour de Justice des Communautés Européennes (1974) 10 RTDE 56.

10. French Raffaele Case, Court of Appeals, Paris, decision of 13.11.70, Gazette du Palais, 1971, J. p.206. Cited and translated in Schermers, note 6 supra

§ 618 (p.354); and see also Schermers, id.

§ 619 for a survey of attitudes of other Courts.
11. Case 51/74 Hulst v Produktschap Voor Siergewassen /1975/ ECR. 79.
12. Schermers, supra n 6 , at 355, n 155.
13. Case 43/75 Gabrielle Defrenne v SABENA /1976/ ECR. 455.
14. Salumi, supra n 4, Recital 10 of Judgment;
Denkavit, Case 61/79 /1980/ E.C.R. 1205
Recital 18 of Judgment. In Defrenne the Court was obviously swayed by the enormous economic impact a fully fledged ex tunc, erga omnes decision would have brought about.

15. Cf. Bebr Remedies for Breach of Community Law
FIDE, Reports of Ninth Congress (Sweet and Maxwell, London, 1980) 10.
But see Warringham v Lloyds Bank [1981] 2 AllER
434, 435 h.

16. See Case 4/79 Providence Agricole de la Champagne
v ONIC [1980] ECR 2823; Case 109/79 Maïseries de
Beauce v ONIC [1980] ECR 2883; Case 145/79
Roquette Frères v French Customs Administration
[1980] ECR 2917. In these particular cases
concerning compensatory amounts the Court
declined retroactivity at least partially
because of the inability accurately to calculate
sums owed. Note also that the cases concern
wrongful application of "secondary" Community
law by Member States rather than conflicting
national measures.

17. Case 33/76 Rewe-Zentralfinanz v Landwirtschaftskammer
für das Saarland [1976] ECR 1980 [hereinafter Rewe].
Case 45/76 Comet v Produktschap voor Siergewassen
[1976] ECR 2043. For a sharp analysis see Bebr,
supra n 15.

18. Denkavit, supra n 14; Salumi, supra n 4;
Case 68/79 Hans Just v Danish Ministry for Fiscal Affairs /1980/ ECR 501; in a slightly different context see Case 130/79 Express Dairy Food v Intervention Board for Agricultural Produce /1980/ ECR 1887. And see Hartley (1980) 5 ELRev 366.
See also, Case 826/79 Amministrazione delle Finanze dello Stato v MIERCO /1980/ ECR 2559; and Case 265/78 Ferwerda v Produktschap Voor Vee en Vlees /1980/ ECR 617. Case 811/79 Amministrazione delle Finanze dello Stato v Ariete S p A /1980/ ECR 2545.
19. Case 39/73 Rewe-Zentralfinanz v Landwirtschaftskammer Westfalen-Lippe /1973/ ECR 1039. The higher Community law was Article 13(1) EEC and Regulation 159/66 EEC.
20. Rewe, supra n 17. Recital 3 of Judgment.

21. The Court at that time, it is submitted, was hardly cognizant of the profound nature of the problem. In subsequent cases the laconism was substituted by more detailed analysis and a greater appreciation of the policy conundrums. The Court even came to express its "regret" at the situation. See n 36 *infra*.

22. Rewe, *supra* n 17, Recital 5 of Judgment.

23. An expression extending to all "the conditions under which [claims] may arise, the requirements for lodging an action, periods of prescription and awards of interest" *Bebr*, *supra* n 15, 104.

24. Commission submissions at 1994.

25. See e.g., *Schermers*, *supra* n 6, §§ 67-88 (pp. 39-51).

26. Rewe, supra n 17, Recital 5 of Judgment.

27. Rewe, supra n 17, Recital 5 of Judgment.

28. Indeed the Court has been quite adept in creatively casting rules of procedure in relation to its direct jurisdiction. Cf. Oliver, Limitation of Actions Before the European Court (1978) ELRev 3. Further, the Court in its human rights cases has indicated its willingness to draw on the different constitutions of the Member States in construing a Community standard. Are procedural rules -- or at least time limits -- so much more difficult? Recently, in its interlocutory decision in Case 149/79, Commission v Belgium [1980] E.C.R. 3881, ———> the Court stated that "reference to [substantive] provisions of domestic level systems [as a means] to restrict the scope of the provisions of Community law, which has the effect of damaging the unity and impairing the efficacy of that law, cannot be accepted" (Proceedings of the Court of Justice no. 28/80, 15-19.12.80). Diverse

domestic procedural provisions may have the same damaging effect on the unity and efficacy of Community law. Yet whereas in Case 149/79 the Court indicated in principle a preparedness to overrule Belgian Constitutional law in order to protect the unity of Community law, in the cases discussed here national procedural law was a sufficient obstacle for the Court to concede disunity and lack of efficacy.

29. In Rewe the Commission correctly asks "... whether each Member-State can, insofar as it is concerned, decide which is the right laid down by national law to which [for the purpose of applying the time limits] a Community right must be assimilated". Rewe, supra n 17, 1994.

30. First steps have been taken in this direction in relation to Community charges. See e.g., Council Regulations 1430/79, OJ 1979 L 175/1; 1697/79 OJ 1979 L 197/1. But note that even here the Regulations are not aimed specifically at reimbursement in cases of annulment or declaration of invalidity by the European Court.

31. See supra n 17. Comparative analysis of this issue may be particularly rewarding.
32. This approach of "tolling" state procedural law is apparently one of the American federal solutions to this problem.
33. Just, supra n 18, Recital 25 of Judgment.
34. This, of course, should be balanced against the possible drop in turnover which the imposition of the illegal charge may have had on the importer's business. The Danish legal system in which the Just case took place acknowledges this factor. See now Case 66/80 ICC (13.5.81) (not yet reported) in which the Court in respect of some Community regimes declined recovery since costs were passed to the consumer.

35. Express Dairy, supra n 18, gives an oblique positive indication as to the question of the erga omnes effect of decisions of invalidity based on 177. The claim was brought on the basis of a similar decision in an earlier case: Case 131/77 Milac v HZA Saarbrücken [1978] ECR 1041. And see Case 66/80 id.

Cf. Cases 4/79, 109/79 and 145/79, supra n 16.

36. Express Dairy, supra n 18, Recital 12 of Judgment. Here the Court was moved to indicate its view by actually acknowledging the "regrettable" absence of Community provisions.

37. See Bebr note 15 supra; Schermers note 6 supra at § 371 (210-211); Case 66/80 note 34 supra.

38. Supra n 7. And see also Case 118/78 C J Meijer B V v Department of Trade and Others [1979] ECR 1387.

39. Cf. Pickin v British Railway Board [1974] AC 765.

But when the British Parliament enacts an Act implementing a directive it is, in principle, administering Community policy. Should not one of the actions for judicial review of administrative action lie against the Act even if in form of full fledged Parliamentary legislation? And cf. Jaconelli (1979) 28 ICLQ 65.

40. See generally Harding (1979) 16 CMLRev 389;
In Case 26/74 Roquette v Commission [1976] ECR 677 the Court said: "On the question of interest ...
[i]n the absence of provisions of Community law on this point, it is currently for the national authorities, in the case of reimbursement of dues improperly collected, to settle all ancillary questions relating to such reimbursement, such as payment of interest". Recital 12 of Judgment.
Determination of quantum of damages falls within the difficult category of issues in which arguably there exist objective societal reasons to pay a different measure of damages to plaintiffs in different Member States suffering from a similar type of non-contractual violation, since the quantum of damages should probably be in line with

the general expectation based on normal awards.

In other words differing expectations would create an "unlike situation" calling for "unlike treatment".

41. See generally, M. Cappelletti and B. Garth (eds.), Access to Justice: A World Survey (Alphen aan den rijn/Milan, Sijthoff/Giuffrè 1978); M. Cappelletti and J. Weisner, (eds.), Access to Justice: Promising Institutions (Alphen aan den rijn/Milan, Sijthoff/Giuffrè 1979); M. Cappelletti and B. Garth (eds.), Access to Justice: Emerging Issues and Perspectives (Alphen aan den rijn/Milan, Sijthoff/Giuffrè 1979).
42. See e.g., Provisional Commission Document, L'Accès des Consommateurs à la Justice, ENV/266/80/orig.
43. Thus, e.g., the question is hardly treated in the otherwise excellent Community Report on Remedies for Breach of Community Law submitted to the Ninth FIDE Congress. Bebr, *supra* n 15.

44. And this despite the very different substantive rights. To create such a distinction might produce and even more offensive type of inequality. The constitutional weakness of the non-Community migrant calls perhaps for even stronger extra-legal protection.
45. JO 1962 L 13/204.
46. Joined Cases 41/73, 43-48/73, 50/73, 111/73, 113/73, 114/73 Générale Sucreries v Commission [1973] ECR 1465.
47. Recitals 7-8 of Judgment.
48. See generally, Temple-Lang, The Position of Third Parties in the EEC Competition Cases, 3 ELRev 177 (1978).
49. Economides and Weiler, (1979) 42 Mod L Rev 683, 694.
50. Id.

Chapter Twelve

Conclusions

A. The Community and the Federal Experience: Divergence and Convergence

The inability neatly to *class*ify the Community experience in classical federal terminology was one of the starting points of this study. I rejected, because of its narrowness, a tendency in political science to characterize the Community as simply confederal (Elazar) or even as moving from federal to confederal (Taylor). Equally unacceptable was the legal approach which, whilst not necessarily using the terminology of federalism, focussed on certain aspects which presented too narrow and unrepresentative an image of the structure of the Community.

Instead our approach was to show through a separate focus on the relationship of norms and actors that in the "normative sense" the experience had strong "federal" (or rather federal state) characteristics whereas in the decisional sense the system was in fact more confederal. Equally, in relation to the third element examined (in Part One), the system of compliance, we found the same duality: an order straddling and perhaps "marrying" international (confederal)

and constitutional (federal state) elements. I suggested that this combination of federalism and confederalism, of relatively high normative supranationalism and low decisional supranationalism, was perhaps a key to giving a meaning, in the structural and processual sense, to the concept of the supranational order.

Failure to grasp this distinction accounts, in my opinion, at least partially for much confusion among Community observers and enables us to understand better some of the conceptual contradictions set out in Chapter One. The main purpose of the analysis was however not confined to a search for a slightly neater conceptualization of the supranational system. Rather it was to trace, from a different angle, the dynamics of its evolution. But here again, our distinction and separate treatment of the two principal strands of supranationalism, as well as the system of compliance, enables us now to examine afresh some of the operational critiques of the system. Dahrendorf, cited in the introduction, is I believe symptomatic. Suggesting a contradiction in evolution he commented, as we will recall, that so far as the substance of European cooperation is concerned the Community has been a success whereas as regards the framework for taking common decisions "... we have locked ourselves into procedures and institutions which at times do more damage than good".

But in the light of our analysis, if correct, we could now suggest that one cannot separate the success from the alleged failure. Thus whereas in the process of conceptualization we were concerned to draw distinctions between the normative and the decisional in the analysis of dynamics we were concerned with interaction.

We did not "lock ourselves into procedures and institutions". The decisional changes were part of a complex process which had its own logic but which were also dependent on the very factors which made substantive cooperation a success. Failure to understand this inter-connectedness (I am not suggesting a rigid determinism); failure to comprehend this as part of the Community supranational system is akin on the operational level to the failure of the theoreticians on the conceptual level.

Both conceptually and operationally then the Community system, the supranational order, represents a divergence from classic non-unitary federal and confederal analogues.

If we turn from norms, actors, and the compliance system to the fourth element in the analysis -- powers and competences -- we will have the clue to one sense (not unique) in which the Community experience displays a profound convergence with the federal, even federal-state, experience. This convergence may be expressed in the notion of "combined federalism".

The modern expression of the national federal experience departs from some of the original notions which saw, at least in a certain sense, as the essence of federalism a division of tasks, competences, powers and execution between the different levels of general and constituent governments.

By contrast the modern reality of federalism, from the 30s in the U.S.A. and since the last World War in most other states, has been one of sharing, cooperation and concordance between the two levels: Sharing in power, sharing in competences and, above all, sharing in execution.

Naturally in each system this notion has developed with its own specificity. In the Federal Republic it is given constitutional expression in the very composition of the federal organs of power. In virtually all federal states the mechanisms of "new federalism" have had an important role in the evolution of sharing and cooperation. The Canadian experience is most telling since there although from the legal point of view separateness was retained largely intact for many years, in many fields the federal government and the provinces combined to achieve certain tasks in areas which formally were in the domain of one or the other. In short this new notion is concerned to preserve the utility which the division of governmental tiers can bring but also in harnessing the utility from cooperation, compilation of resources and joint ventures between the two levels.

In the Community this concept of "combined federalism" finds accord with much of our analysis. In fact in more than one way it is the essence of the Community as a federal experience. At the very constitutional core we observed the necessity and utility, in the supranational system, of judicial cooperation between the European Court of Justice and its national counterparts.

Likewise we observed in the evolution of the processes of decision making the increased intermeshing of Community and Member States at all levels. Our evaluation of this process was mixed but there can be no doubt that for the foreseeable future this co-involvement will remain a permanent feature of the system.

Our discussion of the challenge of compliance in Chapter 10 illustrates the intrusion of the combined model even in relation to such strict principles as supremacy. For although on the constitutional level Community law in its legitimate sphere, is supreme to national law, it falls to national administrations to implement and administer much of this supreme law. Inevitably supremacy can be compromised by the measure of control the national bureaucracies are given. Thus although as a normative-juridical principle, extremely useful in litigation, supremacy and the sharp distinction it highlights between purely municipal and "Community-municipal" (since Community law is considered part of the law of the land) law remains intact, in the day to day evolution and application of Community law the

combined model is not only a reality but an essential requirement for faithful compliance.

It is however above all in relation to the issue of powers and competences that the notion of "combined federalism" finds its most remarkable expression. How has the Community reached a situation where it may -- despite certain dangers -- engage itself in almost any field even far from the strict notion of the Common Market? If we were to condense the analysis of Part Two of this study into one proposition this would be that in the final analysis competences are transferred from the Member States, by the Member States (through their governments - and hence part of the danger) to the Member States.

The process of internal mutation and the considerable "softening" of the principles of preemption, de jure and/or de facto, were the juridical contributions to this process. The Community displays thus, from this perspective, considering all the factors I mentioned, a considerable convergence with the general federal experience.

B. The Dynamics of Supranationalism: Equilibrium and Disequilibrium

The evolution of normative and decisional supranationalism and of the system of compliance were important elements in my argument concerning the equilibrium and resilience of the system. Rather than basing my analysis of equilibrium on a balance between

Community (and Member State) institutions I was concerned with the balance of processes. I argued, especially in Chapter Five, that the diverging

evolutionary trends of the two facets of supranationalism produced a certain equilibrium as regards integrating and disintegrating factors.

Similar balances were perceived in relation to the system of judicial review with its constitutional and institutional dimensions and even in relation to the process of erosion of enumerated powers. It will serve no purpose to reiterate arguments sufficiently rehearsed in the text.

Instead I wish to touch upon the disequilibrating factors inherent in the very same processes and in particular three such factors.

- a. From an international phase to a constitutional phase to a procedural phase

The first is a reflection of the shift from Parts One and Two of this study to Part Three. The very evolution of normative supranationalism on the one hand -- the process of constitutionalization -- and the collapse of strict enumerated powers followed by substantive expansion on the other hand have produced exigencies which do not exist in purely international systems. They have come to exist because of the constitutionalization and because of the substantive expansion.

Since Community policies do involve binding rules on Member States, since they do create legal rights and obligations for individuals, since they do, especially

in the area of "new rights" create social expectations and violation thereof has potential for social disruption, it becomes important that the law is observed, that rights are vindicated, that access to remedies is available, and that in the application of this law constitutional principles of equal protection are maintained. In short, the supranational order, because of its constitutional component demands the effective and just application and administration of its regime. If I may use again the very rough phasing analysis, the shift from the international phase to the constitutional phase produces in turn the necessity of engaging in a 'procedural phase', a phase in which the emphasis should be perhaps less on increased law and policy making but on ensuring that the law already made functions properly and is not either a dead letter or simply disobeyed; or that it is applied equally and without discrimination; or that methods for vindication of rights are available; or that law and policy become alive and real to those who are meant to benefit from it. I have suggested that this is a disequilibrating factor because whereas the constitutionalization produces this exigency, ^{our} analysis in the preceding chapters of Part Three has demonstrated how tough the challenge is. And yet failure to meet the challenge might have serious disruptive effects on that which has already been built.

b. Representation and disequilibria

If the failure to meet these above mentioned exigencies risks undermining the constitutional order, the erosion of strict enumeration created a danger of no less profundity. I have touched upon this factor both in Chapters Three and Nine and sufficient will be a brief recall in this context of discussion on disequilibria. The potential for expansion while promising in many ways is at odds with the decisional structure of the Community. First there is the classical analysis of the democracy deficit. Second, I have underlined the dissonance between expansion into fields with increasing and immediate social contact, and a decision making apparatus and process which is diplomatic, often secret, bureaucratic and might exclude the type of interest representation which is essential for successful acceptable policy. The disequilibrating potential becomes clear. The crucial question for Community decision making becomes thus less one ^{of} "what" but one of "how" and "with whom".

c. The problem of institutions

Although I sought to show a certain untenability in simple complaints on institutional malaise without seeing their development in the wider supranational context one cannot and should not negate the danger in the decline of decisional supranationalism. At the risk

time I would suggest that whereas it is true that the divergence between decisional and normative supranationalism produced a certain equilibrium it also contains the seeds of disequilibrium precisely because of the uneven, nay opposing, development. The reason is simple in the light of the earlier two disequilibrating factors: If the normative evolution has produced these exigencies a solution to which must be found in the political arena, the decline of decisional supranationalism makes such a solution that much more difficult to envisage. Although I do not propose to engage in futurology it may be useful to examine two recent events, the election by direct universal suffrage of the European Parliament and the process of the second enlargement, with a view to assessing possible impact on decisional structures and processes. In this brief analysis I shall be concerned to highlight the difficulties, the barriers to change, which stand in the way of significant changes which these developments might be expected to bring about.

6. The Directly Elected Parliament -- A New "Relance"?^{1/}

On its face it would appear that the new Parliament has a ready slot in the Community decision making process, into which it may fit: initially, even if denuded of

formal legislative power it could make up, by virtue of its newly acquired legitimacy, for the decline of the Commission and become the proposer of new Communautaire policies; it could, by virtue of its much strengthened composition which includes leading personalities drawn from the national political arenas, become a political match to the European Council and Council of Ministers and assert a Community check or Community boost to the activities of these bodies; it could become a new focal point for galvanizing the political will which is a necessary condition for any further qualitative advances in the process of integration; further, by virtue of its more direct and immediate link to its constituents, it could bestow a new "legitimacy" on the entire Community apparatus and commence a new reliance of Community action. It could thus begin to fill the democracy deficit in both its aspects by providing at the Community level effective representation of national even sectoral interests and by preventing the Council from using the Community legislature as a means for passing measures which on the national level would be subject to various checks and controls. According to this admittedly optimistic vision the Commission, while maintaining its formal initiatory function, would -- because of its need for an influential ally in promoting policies hitherto received sceptically by a reluctant Council -- associate closely with the Parliament in the formulation of new programmes and measures.

whether out of democratic respect to a directly elected chamber, or by political need would, according to the same vision, concede at least ^ade facto co-decision *role* to the new chamber. At a later stage there could be a formalization of this process by actual changes in the current de jure competence of the Parliament. Such changes, were they to occur, could not only suggest an arrest in the decline of decisional supranationalism but perhaps even a reversal of trend.^{2/}

Mindful of the connection between the two facets of supranationalism, this reversal would follow a certain legal logic of the system. It will be recorded that in its landmark constitutionalizing decisions the European Court stated as one justification for making the normative supranational leap that "... it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community

through the intermediary of the European Parliament...".^{3/}

There was, with respect, a measure of judicial tongue-in-cheek in that reasoning since in 1963 both in terms of parliamentary decision making power and in terms of Parliament's political composition^{4/} this alleged cooperation by nationals was extremely tenuous. And yet, given that the normative supranational leap was taken for a good many other reasons, it would be possible, even justified, to turn the Court's reasoning on its

head and suggest that instead of the cooperation being a justification for the development of normative supranationalism, that very development which in any event took place should be the justification of effective cooperation, namely a much strengthened Parliament. The call by the supreme German Constitutional Court for a fully fledged European Parliament to which the Council of Ministers would be answerable, as a condition for accepting completely the supremacy rule, follows the same logic.

It is beyond the scope of this analysis to suggest with any degree of precision what shape a reconstructed Parliament-Commission-Council triangle may look like and even what steps the Community organs may take short of a complete overhaul of the entire institutional framework. Rather I would like to suggest some of the barriers which any such initiatives would have to overcome in granting a new role to Parliament.

i. The fact of direct elections is the single most important immediate factor which gives both justification and political power to the demands for a new institutional role for the Parliament. And yet it should not be overlooked that the pattern of voting -- especially in those Member States which show least enthusiasm for the Community -- was disappointingly low even by comparison to national elections.^{5/} The claim for "legitimacy" must therefore

be treated with caution. Probably, the next direct elections, where the novelty factor will have disappeared, will be a more telling fact in this respect. Furthermore, in those Member States where the European Parliamentarians are not closely involved in national politics there would appear to be evidence of a noticeable divide between electors and elected.^{6/}

ii. This divide leads in turn to a further "legitimacy" problem. The European Parliament may be perceived as being part and parcel of the Community bureaucracy. There is a danger of a vicious circle emerging in the delicate relationships among the Community organs on the one hand and the Community as a whole and the Member States on the other. In its quest for more influence the Parliamentary call will often be for more Community policies and more Community spending.^{7/} In the present economic climate and given a growing national grassroots reaction against the Community, this may be a source for a widening of the divide between Parliament associated thus with the negative image of Europe, and electorate. Finding the middleway between electoral credibility and institutional reassertion will thus be another important challenge and barrier to overcome.^{8/}

iii. That the Council may resist Parliamentary resurgence seems obvious. This resistance does not result merely from an inherent unwillingness to concede power to a different forum. Council opposition is rooted in the

very structure of the Community which rejected both maximalist and minimalist, Proudhonian and Hamiltonian versions of federalism.^{9/} The emergence of the European Parliament would, according to this perception, be a dangerous revival of those federal inclinations to be resisted by the Council. The prospect then for a formal change involving, say, an amendment to the Treaties is highly unlikely. In the foreseeable future Parliament will have to utilize its existing powers and political will to carve itself a meaningful policy making role. Given its virtual impotence vis-a-vis the Council it is only natural that Parliament has recently tended to turn its critical attention towards the Commission over which it exercises political control. In particular it has demanded an increased role in the making of proposals realizing that this is at present its only effective way to gain access to the decisional process.^{10/} The naissance of opposition from the Commission is not surprising. Here as well the peculiar dialectics of the institutional balance produce slightly bizarre if not entirely unexpected results. The Commission, acutely cognizant of its weakening position, is not going to concede lightly to an assault from yet another body -- the directly elected chamber -- even if the latter is concerned with the strengthening of the totality of the Communautaire effort. There are already signs of such strains between Commission and Parliament.^{11/}

iv. Finally, it must be noted that Parliament itself is not the cohesive Community minded body with a unitary self-perception of its role as is often imagined. It includes factions -- important ones -- which not only resist further strengthening of supranationalism in its twin facets but which also resist any strengthening of the role of Parliament itself.^{12/} Apart from these internal, democratically understandable, divisions there is the question of pure functional credibility. The new Parliament -- with its numerous members and committees, beset by different traditions, languages and priorities, struggling under a proportionality principle under which each internal parliamentary organ must square political affiliation and national origin^{13/} -- will need considerable time before it finds the modus operandi to balance the conflicting demands coming from within and without. After the first two years it is evident that Parliament has not yet settled into a groove which will enable it to realize the potential inherent in its existence.^{14/} Certainly, these factors are among the most important challenges which the Parliament will have to tackle if the process of reshaping decisional supranationalism is to succeed.

D. The Second Enlargement -- The Question of Numbers

In a useful analysis of association of states in the Canadian context,^{15/} Soberman and Pentland draw a

distinction between two-member associations, associations

in the order of six to ten (Canada, EEC, Australia) and large associations in the order of say fifty such as the USA. The decisional consequences of this distinction are significant.

The two-member association is both promising and dangerous. The small number may facilitate the actual process of negotiation and cooperation with less interests to square and less technical communication barriers to overcome. Arriving at concordance may be simply shorter.^{16/} However, in situations of conflict and polarization -- assuming de facto or de jure veto power of each of the members -- deadlock may, as Soberman and Pentland suggest, have to be resolved by dissolution.

In the medium-size association of which the Community of six or even nine and, perhaps, ten is a good example dissolution-producing polarization is less likely to occur. Unless one Member State finds itself consistently in a minority of one (the U.K. has at times come dangerously close to this situation) there is a high probability of a shift of alliances and interests from one group of states to another maintaining thereby useful equilibria of benefits and interests. The balancing within the Community system of the interests of large and small Member States is an *useful* example of the use of formal voting arrangements for eliminating the possibility of either all the small states or all the large states imposing their will on each other. The Luxembourg Accord

significantly altered this structure by moving from majority voting to consensus decision making giving each Member State an effective veto power. In a medium-size association the alteration would not be lethal. Apart from the effects of, say, the preemption principle which in certain cases obliges the Member States to reach agreement, the very fact of a Member State finding itself isolated in opposition to the rest of the Community renders a consistent use of the veto power difficult and exceptional.

How will the enlargement to twelve -- falling between the medium-size and large categories of associations -- affect the decisional process? In the association of, say, fifty, the possibility of a single constituent veto in the decisional process would render any effective governance simply impossible. Assuming that, in principle, all Member States will continue to be represented, even if with a different weighting, in all Community organs, the shift to twelve may produce different results. The addition of three new South Mediterranean countries at a substantially different level of industrial development compared to most if not all other Member States coupled with difficult socio-agricultural problems, is likely to make consensus decision making much more difficult. It is not improbable that the three new Members will find a common line on many issues. The "embarrassment" factor of consistent isolated vetoing may thus disappear. The common denomination for Community

action will be lowered even further. It is possible to

envisage four possible outcomes to the process.

- a. The bumbling-on possibility: Continuation of the status quo with an increase in the measure of disagreement and crisis solution by way of ad hoc measures. The pattern of activities of the European Council and the Council of Ministers would according to this scenario continue as it is with the same negative impact on decisional supranationalism;
- b. The irrelevance possibility: The clash of interests will become so irreconcilable that it will in practice produce a debilitating standstill of achievement. The inability to advance and to take Community decisions in the face of new challenges will not lead necessarily to a crisis but to irrelevance,^{17/} whereby the fora and methods of decision making will simply shift elsewhere;
- c. The "two (or three?) speed" Europe possibility: Accession might revive the idea^{18/} of a Community posing a different range of duties and obligations and conferring different rights on its Member States. The measure of disunity which this will bring may make this, if a choice is to be made, an unattractive idea. It is certainly being resisted by the Commission;^{19/} it will have a disastrous effect on normative supranationalism as well.
- d. The "dialectical possibility": It is possible that the decisional difficulties which a Community of twelve will present under the current arrangements

and the dangers indicated in the previous three options will push the Member States voluntarily to remedy the decisional process, going beyond the technical suggestions made in the Three Wise Men Report. This remodification may take the shape of a rethink of the veto power; a less recalcitrant attitude towards the European Parliament and a reappraisal of the role of the Commission in the 80s, and 90s. In other words, the decisional dangers presented by enlargement may give the drive to a more rather than less supranational decision making process. Which one or combination of several of these possibilities will emerge is a matter one must simply wait and see. It is interesting however that recently, in relation to the present agricultural crisis France, of all, has requested decision by majority.

5. Policies and Interests - the Missing Element

At no point should we forget that the analysis of dynamics, equilibria and of supranationalism itself cannot be complete without a profound discussion of the actual content of Community policies, and their perception by the Member States and their peoples. A failure to satisfy, over a period of time, essential interests and a sustained negative balance of costs and benefits as perceived from any single Member State will have serious disruptive effects on any general structural and pro-

cessual equilibrium.

On the conceptual level it is equally important to remember that the perception of supranationalism and a supranational system may be construed to include the element of content and not simply structure and process. A supranational system, according to this vision, will be one in which states have transferred to the general power (or pooled together) competences in fields traditionally associated with national sovereignty. Whilst it is impossible to draw with any precision a ranked list^{20/} it is clear that defence and foreign policy rank higher than, say, transport. This complementary element will be the subject of the next phase in my research. The concentration on structure and process is however an indispensable stepping stone to the content analysis; since; I would submit, it gives us a methodological approach not frequently tried in substantive analyses of Community activity.^{21/} It provides essential elements for an examination of policy impact and interest analysis. In relation to any field we would have to examine in turn in an integrated manner the issues of norms, actors, competences and compliance as the major components of the Community system without which any content analysis would be incomplete, even misleading.

But I would go, in conclusion, even further than this. In a fundamental sense the Community structure and process have a value which transcends their importance as a framework for execution of any specific policy and which puts a high premium on their per se preservation. They represent still a unique experience, a historic choice of an alternative for the conduct of relations between states. The single most exciting feature of the supranational order which emerges from our analysis is its ability to achieve such a rare measure of transnational integration, cooperation and coordination while maintaining unthreatened the constituent units -- the Member States -- with their rich diversity and developed national identities. The outside observer cannot but marvel at the transformation of Western Europe within one generation, from a continent in which nationalism took mankind to its lowest abyss in human history, into a region in which the memory/ seems so far away as to be forgotten sometimes by/ people who lived through it. The Community experience, manifest through the supranational structure and process independent of any specific policy choice, must have contributed in some measure to this transformation. Its preservation might give some small hope to regions and peoples still locked in the conflict, victims of national rather than supranational systems.

Footnotes

1. The literature on the European Parliament, its functions and powers is very large. See K. Kujath, Bibliography of European Integration (Europa Union Verlag 1977) § 5.2 and The European Parliament, Bibliography (European Parliament, DG for Research and Documentation, 1979 and 1980).
2. Parliament itself has made proposals in this direction. See Working Documents of the European Parliament: 1-216/81; 1-207/81; 1-335/81 and Resolutions of 9.7.81, PE 73 676.
3. Case 26/62, Van Gend en Loos [1963] E.L.R. 1, 12.
4. Under the system of the dual mandate it was suggested "... that the aspiration of most members of [national] parliaments interested in European affairs [was] also to serve not in the European Parliament, but in national government. In other words, the [European] Parliament [was] also limited by its composition, in that its members tend[ed] to be essentially backbenchers of the national parliaments." Coombes, The Role of the European Parliament in C. Sasse, et al, Decision Making in the European Community (Prager, N.Y.; London, 1977) 239.

5. The overall turnout was 62 per cent. In the U.K. it was 31 per cent. In Italy it was substantially higher but that is a Member State with a general system of ~~required~~ voting albeit without real sanctions against non-voters. See generally, Editorial, 'The European Parliamentary Election' 4 ELRev 145 (1979).

6. A recent poll in the U.K. showed that despite direct elections only recently held the connection between electors and their Members was extremely tenuous. See, 'Britain and the EEC' (1980) Which? 101, 104.

7. It is true of course that Parliament has criticized aspects of the wasteful Common Agricultural Policy. The 1980/81 budgetary crisis may however place Parliament in the public eye as a Community spender opposed to national thrift.

8. In my guess it is likely that the new Parliament will find the necessary majority to censure the Commission as an electorally minded device of correcting this image.

9. For a lucid discussion of the history of these strands in the European Federal movement, see Greil-sammer in Elazar, (ed.) Federalism and Political Integration (Turtle Dove, Ramat-Gan, 1979) 112-119.

10. On Parliament's claim for a greater role in the initiatory phase see generally Working Document 1-207/81; and J. Weiler, The European Parliament and its Foreign Affairs Committees (Cedam, Padua, 1982).

11. The signs of strain are apparent for example in the Commission's delicate rejection of Parliament's request to get a more meaningful say in the international agreement making process. See, e.g., Reply of President Jenkins to the European Parliament, Debates of the European Parliament of 16.4.80 at 136 (English version).

12. See, e.g., Debates of European Parliament of 12.12.1978 at 163 (English version).

13. On the rule of proportionality and its effect on the operation of Parliament, see Weiler, supra n.10 ch.3.

14. See e.g., remarks of Sir Fred Catherwood MEP -- Debates of the European Parliament, 15.2.1980 at 325 (English version).

15. I am indebted to Professor Soberman of Kingston Law School, Canada, discussion with whom was of great help in preparation of this section. In general, see Soberman and Pentland, Forms of Economic Association (to be published by the Institute of Intergovernmental Relations, Queen's University (Canada) in its series of Discussion Papers on the "Future of the Canadian Communities"). And see Soberman, Florence Project.

16. Puchala's model, 10 J.C.M.Stud. 267 (1972), illustrates the variety of interests which have to be squared in reaching concordance among just two states. The larger the Community the more factors, rising geometrically, which will have to be squared in order to reach concordance.

17. See R. Dahrendorf, A Third Europe (E.U.I., Florence, 1979).

18. On the "two speed" Europe, see the Tindemands Report (European Communities, Luxembourg, 1976).

19. See Jenkins, 'Europe à la Carte' (1981) 1/2 Europe
81. Cf. Grabitz and Langeheine Legal Problems Related to a Proposed "Two-Tier System" of Integration within the European Community, 18 CMLRev 33 (1981).

20. But see Elazar and Sharkansky's attempt, in D. Elazar (ed.) Self Rule - Shared Rule (Turtle Dove, Ramat Gan, 1979) at 244. The listing includes:
1) Foreign relations; 2) Police; 3) Military;
4) Internal taxation; 5) Customs; 6) Control of banking and currency; 7) Definition of citizenship and control of immigration; 8) Education; 9) Religious sites and services; 10) Ports; 11) Transportation; 12) Posts and telecommunications; 13) Electric power; 14) Water; 15) Tourism; 16) Health; 17) Environmental protection; 18) Economic development; 19) Regulation of commerce and industry.

21. But see Daintith and Williams, Reh binder and Stewart, Florence Project.

